

**NUCLEAR REGULATORY COMMISSION
ISSUANCES**

**OPINIONS AND DECISIONS OF THE
NUCLEAR REGULATORY COMMISSION
WITH SELECTED ORDERS**

July 1, 2000 – December 31, 2000

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PREFACE

This is the fifty-second volume of issuances (1 – 412) of the Nuclear Regulatory Commission and its Atomic Safety and Licensing Boards, Administrative Law Judges, and Office Directors. It covers the period from July 1, 2000, to December 31, 2000.

Atomic Safety and Licensing Boards are authorized by Section 191 of the Atomic Energy Act of 1954. These Boards, comprised of three members conduct adjudicatory hearings on applications to construct and operate nuclear power plants and related facilities and issue initial decisions which, subject to internal review and appellate procedures, become the final Commission action with respect to those applications. Boards are drawn from the Atomic Safety and Licensing Board Panel, comprised of lawyers, nuclear physicists and engineers, environmentalists, chemists, and economists. The Atomic Energy Commission first established Licensing Boards in 1962 and the Panel in 1967.

Beginning in 1969, the Atomic Energy Commission authorized Atomic Safety and Licensing Appeal Boards to exercise the authority and perform the review functions which would otherwise have been exercised and performed by the Commission in facility licensing proceedings. In 1972, that Commission created an Appeal Panel, from which are drawn the Appeal Boards assigned to each licensing proceeding. The functions performed by both Appeal Boards and Licensing Boards were transferred to the Nuclear Regulatory Commission by the Energy Reorganization Act of 1974. Appeal Boards represent the final level in the administrative adjudicatory process to which parties may appeal. Parties, however, are permitted to seek discretionary Commission review of certain board rulings. The Commission also may decide to review, on its own motion, various decisions or actions of Appeal Boards.

On June 29, 1990, however, the Commission voted to abolish the Atomic Safety and Licensing Appeal Panel, and the Panel ceased to exist as of June 30, 1991. In the future, the Commission itself will review Licensing Board and other adjudicatory decisions, as a matter of discretion. *See* 56 Fed. 29 & 403 (1991).

The Commission also has Administrative Law Judges appointed pursuant to the Administrative Procedure Act, who preside over proceedings as directed by the Commission.

The hardbound edition of the Nuclear Regulatory Commission Issuances is a final compilation of the monthly issuances. It includes all of the legal precedents for the agency within a six-month period. Any opinions, decisions, denials, memoranda and orders of the Commission inadvertently omitted from the monthly softbounds and any corrections submitted by the NRC legal staff to the printed softbound issuances are contained in the hardbound edition. Cross references in the text and indexes are to the NRCI page numbers which are the same as the page numbers in this publication.

Issuances are referred to as follows: Commission—CLI, Atomic Safety and Licensing Boards—LBP, Administrative Law Judges—ALJ, Directors' Decisions—DD, and Decisions on Petitions for Rulemaking—DPRM.

The summaries and headnotes preceding the opinions reported herein are not to be deemed a part of those opinions or to have any independent legal significance.

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UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

COMMISSIONERS:

Richard A. Meserve, Chairman
Greta J. Dicus
Nils J. Diaz
Edward McGaffigan, Jr.
Jeffrey S. Merrifield

In the Matter of

Docket No. 40-8968-ML

HYDRO RESOURCES, INC.
(P.O. Box 15910, Rio Rancho, NM 87174)

July 10, 2000

The Commission considers petitions for review of three Presiding Officer Partial Initial Decisions. The Commission also considers a motion to reopen the record and a motion to supplement the record. The Commission denies review of all technical issues, denies the motion to reopen, and directs the parties to file responses to specific questions relating to the motion to supplement the record.

RULES OF PRACTICE: APPELLATE REVIEW

Where the Presiding Officer has reviewed the extensive record in detail, with the assistance of a technical advisor, the Commission is generally disinclined to upset his findings and conclusions, particularly on matters involving fact-specific issues or where the affidavits or submissions of experts must be weighed. While we certainly have discretion to undertake a *de novo* factual review where appropriate, we ordinarily attach significance to the Presiding Officer's evaluation of the evidence and disposition of the issues, and we do not second-guess his or her reasonable findings.

REGULATIONS: INTERPRETATION (10 C.F.R. § 2.1233(a))

Our rules expressly empower Presiding Officers, on their own initiative, to submit questions to the parties. In a complex proceeding, we cannot fault the Presiding Officer for seeking additional focused discussion, analysis, or other clarification to assist him or her in making ultimate findings.

REGULATIONS: INTERPRETATION

Part 40 license applicants need not provide as part of the application process the names of all individuals who will fill positions within its organization. A commitment to hire qualified personnel prior to operations suffices. The NRC's ongoing enforcement role is well suited to verifying that the licensee satisfies all license-imposed minimum qualifications requirements when the licensee hires employees to fill vacant positions.

RULES OF PRACTICE: REOPENING OF RECORD

Where a litigant in a licensing proceeding attempts to introduce new factual or expert evidence in an untimely fashion, we will reopen the record only when the new evidence raises an exceptionally grave issue calling into question the safety of the licensed activity. *See* 10 C.F.R. § 2.734(a).

MEMORANDUM AND ORDER

Hydro Resources, Inc. ("HRI"), is seeking a license for a proposed *in situ* mining project in New Mexico. The NRC Staff granted the license, but several intervenors have challenged its validity in an adjudicatory proceeding initiated under 10 C.F.R. Part 2, Subpart L. Today's decision is another in a series of appellate decisions in that proceeding. *See, e.g., Hydro Resources, Inc.* (2929 Coors Road, Suite 101, Albuquerque, NM 87120), CLI-00-8, 51 NRC 227 (2000).

In this decision, we consider petitions for review filed by intervenors Eastern Navajo Diné Against Uranium Mining ("ENDAUM") and the Southwest Research and Information Center ("SRIC"). *See* 10 C.F.R. §§ 2.786 and 2.1253. Intervenors seek review of three Presiding Officer Partial Initial Decisions: LBP-99-18, 49 NRC 415 (1999) (technical qualifications); LBP-99-19, 49 NRC 421 (1999) (radioactive air emissions); and LBP-99-30, 50 NRC 77 (1999) (groundwater, cumulative impacts, National Environmental Policy Act, and environmental justice). Also before the Commission is a motion by ENDAUM and SRIC to reopen the record to consider an affidavit by Dr. John Fogarty that

raises questions about an NRC standard applied in this case for determining the allowable concentration of uranium in drinking water. Both HRI and the NRC Staff oppose the petitions for review and the motion to reopen.

After careful review of the petitions, the responses, and the record, the Commission has decided to deny review on all technical issues — i.e., LBP-99-18, LBP-99-19, and the groundwater portion of LBP-99-30¹ — and to deny the motion to reopen. We are, however, referring the generic issues raised by Dr. Fogarty’s affidavit to the NRC Staff for appropriate action. Finally, we direct the parties to submit briefs to the Commission providing further information on the practical and legal significance of a recent decision of the United States Court of Appeals for the Tenth Circuit. *See Hydro Resources, Inc. v. EPA*, 198 F.3d 1224 (10th Cir. 2000).

A. Petitions for Review

The Presiding Officer’s findings in LBP-99-18, LBP-99-19, and Part II of LBP-99-30 rest heavily upon his analysis of the parties’ fact-specific submissions and arguments. As we have held previously in this proceeding, “[b]ecause the Presiding Officer has reviewed the extensive record in detail, with the assistance of a technical advisor, the Commission is generally disinclined to upset his findings and conclusions, particularly on matters involving fact-specific issues or where the affidavits or submissions of experts must be weighed.” *Hydro Resources, Inc.* (2929 Coors Road, Suite 101, Albuquerque, NM 87120), CLI-99-22, 50 NRC 3, 6 (1999). While we certainly have discretion to undertake a *de novo* factual review where appropriate, we ordinarily “‘attach significance to [the presiding officer’s] evaluation of the evidence and . . . disposition of the issues,’” and we do not “‘second-guess’” his or her reasonable findings. *Louisiana Energy Services, L.P.* (Claiborne Enrichment Center), CLI-98-3, 47 NRC 77, 93 (1998), quoting *Duke Power Co.* (Catawba Nuclear Station, Units 1 and 2), ALAB-355, 4 NRC 397, 403-05 (1976).

With these principles of appellate review in mind, the Commission has carefully considered Intervenor’s challenge to the Presiding Officer’s findings on radioactive air emissions, groundwater, and technical qualifications and find unpersuasive the arguments for Commission review of these findings. Intervenor has identified no “‘clearly erroneous’” factual finding or important legal error requiring Commission correction. *See* 10 C.F.R. § 2.786(b)(4). Nor do we agree with Intervenor that the Presiding Officer’s procedural rulings prejudiced their

¹The remainder of LBP-99-30 deals with NEPA, environmental justice, and other issues that the Commission still is considering and does not resolve here. The Commission also has not yet completed its consideration of the Presiding Officer’s decisions to “bifurcate” the proceeding by site and to hold in abeyance all litigation on issues not involving the “Section 8” site. *See* CLI-00-8, 51 NRC at 242-43.

ability to make their case. Accordingly, we see no reason to call for full briefing or for plenary Commission review. Two of Intervenor's arguments, however, warrant brief special comment, as the Presiding Officer said little about them.

First, Intervenor's complain that, after the initial pleadings and submissions, the Presiding Officer posed additional written questions to the parties on technical qualifications, radioactive air emissions, groundwater, and NEPA issues. As the Intervenor's complaint goes, the additional questions unfairly permitted HRI and the NRC Staff to cure fatal deficiencies in their initial written presentations. We have reviewed the questions posed by the Presiding Officer, along with the parties' answers. The questions seem to us a legitimate effort to obtain clarification or elaboration of assertions in existing pleadings. Our rules expressly empower presiding officers, on their "own initiative," "to submit written questions to the parties." 10 C.F.R. § 2.1233(a). This has been a complex, lengthy proceeding with a host of highly technical issues, many of which overlap. We cannot fault the Presiding Officer for seeking additional focused discussion, analysis, or other clarification to assist him in making his ultimate findings.

Second, Intervenor's fault the Presiding Officer for finding HRI's technical qualifications acceptable even though HRI's license application did not identify particular personnel for safety-sensitive positions. Intervenor's say that "there are five key positions in HRI's structure, but [that] the individuals whom HRI has cited for their experience will fill only three of those positions." *See* Intervenor's Petition for Review at 5 (Sept. 3, 1999). But it is hardly surprising that HRI has not yet hired a full staff. HRI forthrightly has acknowledged that it has no immediate plan to begin *in situ* mining at the licensed site. As the NRC Staff has explained, Part 40 license applicants need not provide, "as part of the application process, the names of individuals who will fill positions within its organization." *See* NRC Staff's Response to Petition for Review at 10 (Sept. 17, 1999). A commitment to hire qualified personnel prior to operations suffices. The NRC Staff's ongoing enforcement role is well suited to verifying that HRI satisfies all license-imposed minimum qualifications requirements when HRI hires employees to fill vacant positions.

Here, the NRC Staff evaluated and found adequate HRI's proposed organizational structure, "including the expertise and training requirements of key HRI corporate positions." *Id.* at 9. License conditions control the specific qualifications (education, training, and experience) necessary for HRI's Radiation Safety Officer and any Radiation Safety Technician, and further outline the requirements of HRI's radiation safety training program for all site employees. *See* License Condition 9.7. Additional license conditions govern written standard operating procedures, and any corporate changes that may affect the assignments or responsibilities of radiation safety personnel. *See* License Conditions 9.8, 9.10. License conditions also dictate the minimum education and experience requirements for other key positions — the Vice President of Health, Safety, and Environmental

Affairs, the Vice President of Technology, and the Environmental Manager. *See* License Condition 9.3 (incorporating minimum qualifications for these positions, listed in HRI's Consolidated Operations Plan (COP), Rev. 2.0, at 132-33 (Aug. 15, 1997)).²

There is, in short, no good reason for the Commission to review the findings made by the Presiding Officer in LBP-99-18, LBP-99-19, and Part II of LBP-99-30, and we decline to do so.

B. Motion to Reopen

Recently, during the appellate phase of this proceeding, Intervenors ENDAUM and SRIC came to the Commission with a motion to reopen the record concerning the "secondary" groundwater restoration standard for drinking water. In this case, the NRC Staff used as the secondary standard 0.44 milligram per liter ("mg/l") for natural uranium. *See* License Condition 10.21(A). Intervenors' motion to reopen attacks this standard and relies on an affidavit of Dr. John D. Fogarty. Dr. Fogarty's affidavit, which was not submitted to the Presiding Officer, raises questions about the 0.44 mg/l secondary standard, and points to several studies of uranium chemical toxicity. He argues that the 0.44 mg/l secondary restoration standard is excessively high, chemically toxic if ingested on a long-term basis, and thus unprotective of public health and safety.

We decline to reopen the adjudicatory record. Where, as in this case, a litigant in a licensing proceeding attempts to introduce new factual or expert evidence in an untimely fashion,³ we will reopen the record only when the new evidence raises an "exceptionally grave issue" calling into question the safety of the licensed activity. *See* 10 C.F.R. § 2.734(a); *see generally Public Service Co. of New Hampshire* (Seabrook Station, Units 1 and 2), ALAB-886, 27 NRC 74, 76-79 (1988). After reviewing Dr. Fogarty's affidavit and supporting material, we find no "exceptionally grave issue" warranting reopening here. Some context and background are necessary to understand the basis for our finding.

According to HRI's license, lixiviant may not be injected into a well field before additional groundwater data are collected and analyzed to establish groundwater restoration goals for each monitored aquifer of the well field. For each water quality parameter measured — uranium concentration is one of them — the

²Indeed, the Staff in its review found unacceptable HRI's originally proposed minimum qualifications for Radiation Safety Technicians. The Staff accordingly imposed a specific license condition to heighten the minimum level of education and experience for Radiation Safety Technicians. *See* Safety Evaluation Report at 6-7; License Condition 9.7.

³The Intervenors concede their motion to reopen is untimely. The studies Dr. Fogarty primarily relies upon were published well before the hearing on Section 8 closed, and before the Intervenors submitted their written presentation on groundwater protection. Nonetheless, the Intervenors claim that they could not have presented these studies without the sponsorship of Dr. Fogarty. This claim is unpersuasive. Just as Dr. Fogarty conducted a "literature research" on uranium's chemical toxicity, the Intervenors (or their technical experts) likewise could have done so.

primary groundwater restoration goal is to return the parameter to its average original baseline level. *See* License Condition 10.21. Therefore, the primary restoration goal for uranium, as well as for all parameters, will be to return to the average “pre-lixiviant injection level[.]” *Id.*

The *secondary* water restoration goal only becomes an issue if HRI cannot restore the water to the primary goal. For uranium concentration, the NRC Staff set the secondary restoration goal at 0.44 mg/l. The 0.44-mg/l standard is the focus of Dr. Fogarty’s concerns. But for the Church Rock Section 8 site — the only site considered by the Presiding Officer — it is unlikely that the secondary restoration standard will ever come into play. The Final Environmental Impact Statement estimates the current average level of uranium at Section 8 to be 1.8 mg/l, a level well above the secondary restoration goal of 0.44 mg/l. *See* FEIS 3-36. HRI will not be required to restore the uranium level in Section 8 to a cleaner, more stringent level than the average level already existing in Section 8. The 1.8-mg/l estimate is the average for uranium drawn from water sampling data collected thus far.

We are mindful that HRI has yet to collect the additional data necessary to establish a *definitive* baseline for uranium at Section 8. *See* License Condition 10.21. It is conceivable that in the end the Section 8 baseline will prove lower than 1.8 mg/l or even lower than 0.44 mg/l. But our hearing process does not provide a forum for litigating all conceivable outcomes, no matter how remote and speculative. Here, considering the water quality data already collected, the Commission believes it is highly unlikely that the baseline level of uranium in Section 8 will prove to be so much lower than 1.8 mg/l that it falls under the secondary restoration standard of 0.44 mg/l.

Thus, given that (1) HRI may not inject lixiviant into a well field before additional groundwater data have been collected and primary restoration goals have been established, and (2) the challenged secondary restoration goal appears unlikely ever to even be an issue for Section 8, the first section to be mined, the Commission finds that Dr. Fogarty’s affidavit does not raise immediate safety concerns and is unlikely even in the long term to have safety significance at the Section 8 site. In short, there are no “exceptionally grave” exigent circumstances sufficient to warrant the extraordinary step of reopening the record and restarting the hearing process.⁴

⁴We note that Dr. Fogarty’s concerns may bear on the other three sites covered by the HRI license. Since the record is not closed concerning those sites, the Petitioners may raise this groundwater issue in the hearing on those sites. *See* CLI-00-8, 51 NRC at 242; LBP-99-40, 50 NRC 273, 276 (1999). There is no immediate health and safety concern because HRI has stated it has no current plans to mine those sites in the near future and, moreover, HRI may not begin mining those sites without first fulfilling various legal obligations. *See id.* Because Dr. Fogarty’s concerns raise generic issues regarding secondary groundwater standards, the Commission is referring this issue to the Staff for appropriate action. If later Board proceedings or Staff findings suggest that rulemaking or other licensing actions are necessary, the Commission remains free to take such action.

C. Tenth Circuit Decision

Another groundwater-related issue also warrants discussion. Intervenors ENDAUM and SRIC have filed a motion to supplement the record, claiming that a recent Tenth Circuit decision established HRI's lack of either a valid underground injection control ("UIC") permit or a valid aquifer exemption under the Safe Drinking Water Act ("SDWA") for the Section 8 site. *See Hydro Resources, Inc. v. EPA*, 198 F.3d 1224 (10th Cir. 2000), *rehearing en banc denied*, No. 97-9566 (Mar. 30, 2000). Intervenors maintain that "[a]ny findings by the Presiding Officer that rest on the presumption of a validly issued aquifer exemption or UIC permit must be reversed." *See* Motion to Supplement the Record at 3 (Jan. 27, 2000).

The Tenth Circuit decision — of which we may take judicial notice without "supplementing" the record — upheld EPA's decision to treat Section 8 as "disputed" Indian country. When land in question holds "Indian country" status, the applicable UIC requirements are those of the federal UIC program. If, however, Section 8 were found not to be Indian country, then New Mexico's state-administered UIC program would apply. HRI obtained a UIC permit for Section 8 from New Mexico in 1989, but has not obtained a federal permit. The Tenth Circuit decision found that "Section 8 lands are subject to a jurisdictional dispute requiring implementation of the direct federal UIC program under the SDWA." *See* 198 F.3d at 1254. Consequently, because of this as-yet-unresolved jurisdictional dispute, "HRI must now obtain a permit from EPA prior to commencing underground injection on Section 8." *See id.* at 1237. HRI and the NRC Staff maintain that the Tenth Circuit decision is irrelevant to the licensing issues at stake in this case.

We frankly are uncertain about the relevance of the Tenth Circuit decision to our case. The Presiding Officer referred to the aquifer exemption in a number of places in his decision below. *See, e.g.*, 50 NRC at 108 ("[t]his exemption means that . . . there is no drinking water to be protected at this site"). *See also id.* at 102, 109. Despite Intervenors' motion to supplement the record and the responses of HRI and the NRC Staff, it remains unclear to us what effect there would be, if any, upon the Presiding Officer's findings if Section 8 were found conclusively to fall within "Indian country," and HRI no longer possessed a valid aquifer exemption or UIC permit.

Accordingly, the Commission requests the parties to answer the following questions: (1) Did the Presiding Officer rely upon a current valid aquifer exemption or UIC permit for any of his technical groundwater findings? (2) If so, would any of these findings be undermined if Section 8 ultimately were found conclusively to fall within "Indian country" and thus within the jurisdiction of the federal UIC program? (3) Was it even necessary for the Presiding Officer to address whether the HRI project would comply with the Safe Drinking Water

Act? (4) What practical effect does the Tenth Circuit's decision have upon HRI's schedule or plans for mining Section 8?

The parties shall respond to these questions in 15 pages or less. Responses shall be filed simultaneously, and within 30 days of this Order.

D. Conclusion

For the foregoing reasons, the Commission (a) *denies* the petitions for review challenging LBP-99-18, LBP-99-19, and Part II of LBP-99-30; (b) *denies* the motion to reopen; and (c) *directs* the parties to file responses to the Commission's questions on the effect of the Tenth Circuit's decision in *Hydro Resources, Inc. v. EPA*.

IT IS SO ORDERED.

For the Commission⁵

ANNETTE L. VIETTI-COOK
Secretary of the Commission

Dated at Rockville, Maryland,
this 10th day of July 2000.

⁵ Commissioner Dicus was not available for the affirmation of this Order. Had she been present, she would have affirmed the Order.

UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

ATOMIC SAFETY AND LICENSING BOARD

Before Administrative Judges:

G. Paul Bollwerk, III, Chairman
Dr. David Schink

In the Matter of

Docket No. 50-460-OL
(ASLBP No. 82-479-06-OL)

WASHINGTON PUBLIC POWER
SUPPLY SYSTEM
(WPPSS Nuclear Project No. 1)

July 26, 2000

In this proceeding concerning the application of the formerly designated Washington Public Power Supply System (WPPSS) (now doing business as Energy Northwest) for a 10 C.F.R. Part 50 operating license for its Nuclear Project No. 1, the Licensing Board dismisses the case because the intervening party and an interested governmental entity that were admitted to the proceeding failed to respond to Board requests for information or otherwise prosecute this action.

RULES OF PRACTICE: AUTHORITY TO REGULATE
PROCEEDINGS

When parties, for whatever reason, fail to respond or otherwise comply with presiding officer requests, the presiding officer has the authority to take appropriate action in accordance with its power and duty to maintain order, to avoid delay, and to regulate the course of the hearing and the conduct of the participants. *See Private Fuel Storage, L.L.C.* (Independent Spent Fuel Storage Installation), LBP-00-5, 51 NRC 64, 67 (2000); *see also Long Island Lighting Co.* (Shoreham Nuclear Power Station, Unit 1), LBP-82-115, 16 NRC 1923, 1928 (1982).

LICENSING BOARDS: DISCRETION IN MANAGING PROCEEDINGS; SANCTIONS

RULES OF PRACTICE: DEFAULT; DISMISSAL OF CONTENTION (DEFAULT)

Section 2.707 of Title 10 of the *Code of Federal Regulations* has previously been invoked as a basis for dismissing a stated contention following the intervening party's failure to prosecute the issue. See *Boston Edison Co.* (Pilgrim Nuclear Generating Station, Unit 2), LBP-76-7, 3 NRC 156, 157 (1976); see also *Public Service Co. of New Hampshire* (Seabrook Station, Units 1 and 2), LBP-90-12, 31 NRC 427, 429-31, *aff'd in part*, ALAB-934, 32 NRC 1 (1990); *Consumers Power Co.* (Palisades Nuclear Power Facility), LBP-82-101, 16 NRC 1594, 1595-96 (1982).

LICENSING BOARDS: DISCRETION IN MANAGING PROCEEDINGS; SANCTIONS

It is the presiding officer's duty to set and adhere to reasonable schedules for the various steps in the hearing process, with the expectation that the parties will comply with the scheduling orders set forth in the proceeding and that the presiding officer will take appropriate action against parties who fail to comply. See *Statement of Policy on Conduct of Adjudicatory Proceedings*, CLI-98-12, 48 NRC 18, 21-22 (1998).

LICENSING BOARDS: RESPONSIBILITIES (DEVELOPMENT OF RECORD ON DEFAULTED ISSUES); SCOPE OF REVIEW (SUA SPONTE)

RULES OF PRACTICE: DEFAULT; SUA SPONTE REVIEW

Although there is case law suggesting that when terminating a proceeding based on a party's failure to comply with a presiding officer's directive, a presiding officer should undertake a review of outstanding issues to ensure that there are no serious matters that require consideration, see *Pilgrim*, LBP-76-7, 3 NRC at 157; see also *Private Fuel Storage*, LBP-00-5, 51 NRC at 68; *Seabrook*, LBP-90-12, 31 NRC at 431, more recently in its *Statement of Policy on Conduct of Adjudicatory Proceedings*, CLI-98-12, 48 NRC at 22-23, the Commission emphasized that only in "extraordinary circumstances" should a presiding officer, on its own initiative, engage in the consideration of health, safety, environmental, or common defense and security matters outside the scope of the contentions at issue, and that such a determination should be followed by a referral to the Commission.

MEMORANDUM AND ORDER
(Terminating Reactor Operating License Proceeding)

This proceeding concerns the application of Washington Public Power Supply System (WPPSS) for an operating license (OL) for its Nuclear Project No. 1 (WNP-1) located in Richland, Washington.¹ In 1983, this Licensing Board granted intervening party and interested governmental entity status, respectively, to the Coalition for Safe Power (CSP) and the State of Washington (State) relative to this proceeding. Several months later, however, the WNP-1 OL application was deferred and this proceeding has remained essentially dormant since that time. Recently, WPPSS requested that its OL application be withdrawn and that this proceeding be terminated, but subsequently asked that its withdrawal be held in abeyance pending consideration of new developments and budgetary restructuring. CSP and the State were invited to respond to both of these requests, but neither has done so. Both also failed to respond to a March 30, 2000 Board order to show cause as to why this proceeding should not be dismissed for want of prosecution.

With the failure of CSP and the State to acknowledge the Board's repeated requests for responses, in particular its order to show cause, there apparently is no longer any intervening party or interested governmental entity with an interest in continuing this adjudicatory proceeding. We thus dismiss this proceeding for want of prosecution.

I. BACKGROUND

On June 23, 1983, Intervenor CSP and the State of Washington, an interested governmental entity, were admitted to this reactor OL proceeding pursuant to 10 C.F.R. §§ 2.714 and 2.715(c), respectively. *See* LBP-83-66, 18 NRC 780, 780-81 (1983). Subsequently, WPPSS notified the Board that construction of WNP-1 would be deferred indefinitely and asked that this proceeding be suspended as well. On October 14, 1983, the Board granted this request and required WPPSS to file quarterly status reports regarding the WNP-1 facility. *See id.* at 798-801. According to WPPSS, WNP-1 has been preserved in a deferred status since that time pursuant to the requirements found in the Commission's "Policy Statement on Deferred Plants," 52 Fed. Reg. 38,077 (1987). *See* Motion for Withdrawal of Application (Jan. 4, 2000) at 1.

After a number of years of filing quarterly reports with the Board, on May 13, 1994, the WPPSS Board of Directors voted to terminate the WNP-1 project.

¹Although WPPSS was the Applicant's name of record during most of this licensing proceeding, WPPSS is now conducting business under the name Energy Northwest. For the purpose of clarity, this Order will refer to the Applicant as WPPSS.

However, in letters dated May 17, 1994, and February 15, 1995, the WPPSS Board of Directors informed the Board that it wished to maintain the WNP-1 construction permit and to continue the deferred status of the OL application in order to maximize the value of the project and the equipment involved until the facility's future was decided. Since 1994, WPPSS has maintained a limited project preservation program while considering other alternative uses for WNP-1. *See id.* at 2.

On January 4, 2000, WPPSS filed a motion for withdrawal of application requesting, pursuant to 10 C.F.R. § 2.107(a), that the Board issue an order authorizing the withdrawal of the OL application and termination of this proceeding. WPPSS also indicated it was prepared to terminate the WNP-1 construction permit. *See id.* at 3. By order dated January 11, 2000, the Board provided the parties with an opportunity to file responses to the WPPSS withdrawal motion. The participants initially were given until January 31, 2000, to respond; however, because of a concern about service of process on the participants to the proceeding, by memorandum and order dated February 16, 2000, the Board extended the participants' scheduled responses until March 3, 2000. In that issuance, the Board also requested that the participants provide a current telephone number, facsimile number, and e-mail address for their counsel or other representative. The Board, however, received no response to the WPPSS withdrawal motion or the request for appearance information from either CSP or the State.

Before the Board could act on the WPPSS January 4, 2000 application withdrawal motion, on February 29, 2000, WPPSS filed a request that the Board defer and hold in abeyance a decision on that motion due to new developments and budgetary considerations regarding WNP-1. WPPSS further disclosed that it was reconsidering various alternatives for the facility and, therefore, requested that the licensing proceeding continue in its current deferred status until further clarification of the proposed plans. *See* [WPPSS] Request to Defer Licensing Board Ruling (Feb. 29, 2000) at 1-2.

On March 7, 2000, the Board ordered the parties to respond to the WPPSS February 29, 2000 request to defer its ruling on the pending application withdrawal request. In that order, the Board specifically requested that the intervening parties address whether or not they wished to continue in this OL proceeding involving the WNP-1 facility. The Board ordered that any responses to the WPPSS deferral request should be filed on or before March 22, 2000. On March 21, 2000, the Staff indicated that it had no objections to the grant of the request for deferral. *See* NRC Staff Response to [WPPSS] Request to Defer Licensing Board Ruling (Mar. 21, 2000) at 1. However, there were no responses by CSP or the State.

As a result of the failure to respond to various requests, on March 30, 2000, the Board put forth the pending show cause order, which was published in the *Federal Register* on April 5, 2000, *see* 65 Fed. Reg. 17,906, 17,906-07 (2000), inquiring why this reactor OL proceeding should not be dismissed for want of

prosecution. The Board declared that the failure of CSP and the State to respond to the various WPPSS pleadings and the Board's information requests suggested that neither, as the parties involved in initiating this proceeding, had a continuing interest in pursuing this litigation involving the WPPSS WNP-1 facility.

Although the Staff indicated that it did not intend to file a response to the Board's show cause order, *see* Letter from Ann P. Hodgdon, NRC Staff Counsel, to the Licensing Board (Apr. 12, 2000), the period of time permitted for responses lapsed without any answer from the other participants.

II. ANALYSIS

The question now before the Board is whether this case should be dismissed because of the failure of intervening party CSP and interested governmental entity State of Washington, to provide any indication of their intent to participate further in this OL proceeding despite several Board requests for such information. For the reasons set forth below, the Board concludes that this action should be terminated for want of prosecution by CSP and the State.

When parties, for whatever reason, fail to respond or otherwise comply with Board requests, the Board has the authority to take appropriate action in accordance with its power and duty to maintain order, to avoid delay, and to regulate the course of the hearing and the conduct of the participants. *See Private Fuel Storage, L.L.C.* (Independent Spent Fuel Storage Installation), LBP-00-5, 51 NRC 64, 67 (2000); *see also Long Island Lighting Co.* (Shoreham Nuclear Power Station, Unit 1), LBP-82-115, 16 NRC 1923, 1928 (1982). In this regard, 10 C.F.R. § 2.707 declares “[o]n failure of a party to file an answer or pleading within the time prescribed . . . as specified in the notice of hearing or pleading . . . [or] to appear at a hearing or prehearing conference, . . . the presiding officer may make such orders in regard to the failure as are just . . .” (footnote omitted). Indeed, this provision has previously been invoked as a basis for dismissing a stated contention following the intervening party's failure to prosecute the issue. *See Boston Edison Co.* (Pilgrim Nuclear Generating Station, Unit 2), LBP-76-7, 3 NRC 156, 157 (1976); *see also Public Service Co. of New Hampshire* (Seabrook Station, Units 1 and 2), LBP-90-12, 31 NRC 427, 429-31, *aff'd in part*, ALAB-934, 32 NRC 1 (1990); *Consumers Power Co.* (Palisades Nuclear Power Facility), LBP-82-101, 16 NRC 1594, 1595-96 (1982). Moreover, as the Commission emphasized in its recent *Statement of Policy on Conduct of Adjudicatory Proceedings*, CLI-98-12, 48 NRC 18, 21-22 (1998), it is the Board's duty to set and adhere to reasonable schedules for the various steps in the hearing process, with the expectation that the parties will comply with the scheduling orders set forth in the proceeding and that the Board will take appropriate action against parties who fail to comply.

Accordingly, notwithstanding the considerable passage of time since there has been any substantive activity in this case, as an intervening party and an interested governmental entity, respectively, CPS and the State are under an obligation to comply with the Board's requests for information and to demonstrate through their responses that they have an interest in continuing to participate in this litigation. The repeated failure of these participants to respond, as detailed *infra*, leaves the Board with no reasonable alternative other than to dismiss this proceeding.

Intervenor CSP and interested governmental entity State of Washington have demonstrated a lack of interest in this proceeding on numerous occasions. They first neglected to provide responses to the January 4, 2000 WPPSS withdrawal motion. This failure occurred even after the Board extended the filing date from January 31, 2000, to March 3, 2000, based on the possibility that these parties may not have received service of process. In addition, during this time frame, the Board sought twice to obtain current appearance information from these participants, which also proved unsuccessful. Thereafter, by order dated March 7, 2000, the Board requested that these participants respond to the WPPSS February 29, 2000 withdrawal deferral motion, specifically requesting that they inform the Board of any decision they had made regarding their continued participation in this OL proceeding. The Board's attempts once again proved fruitless as no responses were filed by CSP or the State. Then, as a final appeal to these participants, on March 30, 2000, the Board issued and published in the *Federal Register* a show cause order asking why this proceeding regarding the WNP-1 OL application should not be terminated due to want of prosecution by CSP and the State.² CSP and the State have failed to respond to this Board request as well.

As a result of these repeated failures to act, the Board finds that this OL proceeding involving the WNP-1 facility should be terminated. In taking this dismissal action, however, we note that there is case law suggesting that when terminating a proceeding based on a party's failure to comply with a Board directive, a presiding officer should undertake a review of outstanding issues to ensure that there are no serious matters that require consideration. *See Pilgrim*, LBP-76-7, 3 NRC at 157; *see also Private Fuel Storage*, LBP-00-5, 51 NRC at 68; *Seabrook*, LBP-90-12, 31 NRC at 431. More recently, however, in its *Statement of Policy on Conduct of Adjudicatory Proceedings*, CLI-98-12, 48 NRC at 22-23, the Commission again emphasized that only in "extraordinary circumstances" should the Board, on its own initiative, engage in the consideration of health, safety, environmental, or common defense and security matters outside the scope

² Despite the extended period of inaction in this proceeding, individual service of the show cause order on these participants at the last known address they provided the Office of the Secretary for this proceeding's service list, in combination with its publication in the *Federal Register*, provides CSP and the State with the requisite notice of the Board's proposed dismissal action. *See Private Fuel Storage, L.L.C.* (Independent Spent Fuel Storage Installation), LBP-98-7, 47 NRC 142, 173 (citing 44 U.S.C. § 1508), *reconsideration granted in part and denied in part on other grounds*, LBP-98-10, 47 NRC 288, *aff'd*, CLI-98-13, 48 NRC 26 (1998).

of the contentions at issue, and that such a determination should be followed by a referral to the Commission. We know of nothing here that falls into that category.

III. CONCLUSION

Because intervening party CSP and interested governmental entity State of Washington have failed to respond to numerous Board orders, including the Board's March 30, 2000 order to show cause why this proceeding should not be dismissed, it appears they no longer have an interest in continuing this litigation. Accordingly, this OL proceeding regarding the WPPSS WNP-1 facility is terminated for want of prosecution.

For the foregoing reasons, it is, this twenty-sixth day of July 2000, ORDERED that the pending contentions of intervenor CSP regarding this operating license proceeding involving the WPPSS WNP-1 facility are *dismissed* and this proceeding is *terminated*.

This Memorandum and Order terminating this proceeding will constitute the final decision of the Commission forty (40) days from the date of its issuance, or on *Tuesday, September 5, 2000*, unless a petition for review is filed in accordance with 10 C.F.R. § 2.786, or the Commission directs otherwise. Within fifteen (15) days after service of this memorandum and order, any party may file a petition for review with the Commission on the grounds specified in 10 C.F.R. § 2.786(b)(4). The filing of a petition for review is mandatory in order for a party to have exhausted its administrative remedies before seeking judicial review. Within ten (10) days after service of a petition for review, any party to the proceeding may

file an answer supporting or opposing Commission review. The petition for review and any answers shall conform to the requirements of 10 C.F.R. § 2.786(b)(2)-(3).

THE ATOMIC SAFETY AND
LICENSING BOARD³

G. Paul Bollwerk, III
ADMINISTRATIVE JUDGE

Dr. David R. Schink
ADMINISTRATIVE JUDGE

Rockville, Maryland
July 26, 2000

³Copies of this Memorandum and Order were sent this date by Internet e-mail transmission to counsel for (1) Applicant WPPSS, and (2) the Staff; and by regular mail to all other participants on the existing service list for this proceeding.

UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

OFFICE OF NUCLEAR REACTOR REGULATION

Samuel J. Collins, Director

In the Matter of

Docket No. 50-286
(License No. DPR-64)

POWER AUTHORITY OF THE
STATE OF NEW YORK
(Indian Point Nuclear Generating
Station, Unit 3)

July 26, 2000

The Petitioner requested that the NRC order the Licensee to conduct assessments of the Indian Point 3 (IP3) corrective action program and work environment and to take appropriate action in response to these assessments. The Petitioner further requests that these orders be closed before the NRC allows the transfer of the IP3 license. As the basis for the requested action, the Petitioner cited allegations by Ms. Rebecca Green, formerly a member of the Licensee's Operations Review Group, that her work environment was not safety conscious. The Petitioner also cited various inspection reports, which identified shortcomings in the Licensee's corrective action programs, as well as a letter informing the Licensee of a potential violation of 10 C.F.R. § 50.7 involving discrimination against an employee.

The Director of the Office of Nuclear Reactor Regulation issued a Director's Decision on July 26, 2000, and the petition was closed. The Director's Decision concluded that the issues the Petitioner raised had merit; however, the issues have already been addressed by the Staff, and the Licensee has been generally effective in identifying and correcting defects in their corrective action program, and having employees feel comfortable in raising safety concerns. Because the Petitioner's concerns have effectively been addressed, enforcement action to order the Licensee to conduct the requested audits was not necessary to provide reasonable assurance in the effectiveness of the Licensee's corrective action program and safety-conscious work environment. With the exception of issuing an order, the actions requested by the Petitioner have essentially been implemented.

DIRECTOR'S DECISION UNDER 10 C.F.R. § 2.206

I. INTRODUCTION

By letter dated February 10, 2000, Mr. David A. Lochbaum, on behalf of the Union of Concerned Scientists (Petitioner), pursuant to section 2.206 of Title 10 of the *Code of Federal Regulations* (10 C.F.R. § 2.206), requested that the U.S. Nuclear Regulatory Commission (Commission or NRC) take action with regard to the Indian Point Nuclear Generating Unit No. 3 (IP3), owned and operated by the Power Authority of the State of New York (PASNY or the Licensee). The Petitioner requested that the NRC order PASNY to assess the corrective action process and the work environment at IP3 and to take timely actions to remedy any deficiencies it may identify.

II. BACKGROUND

The specific concerns that the Petitioner cited relative to the Licensee's corrective action program related to an April 20, 1999 letter from the NRC to the Licensee in which the Staff was critical of the Licensee's Deviation Event Report (DER) screening for a problem with a feed pump; an August 9, 1999 letter in which the Staff noted several discrepancies related to an inconsistent understanding of plant management's expectations for the DER process; a September 30, 1999 letter in which the Staff listed a number of shortcomings that the NRC had identified in the Licensee's corrective action program; and an October 13, 1999 letter in which the Staff raised concerns about weaknesses in the Licensee's root-cause analysis of a problem with a fuel oil storage tank. The specific concerns that the Petitioner cited relative to the safety-conscious work environment consisted of assertions made by a former member of the Licensee's Operations Review Group (ORG) that the work environment is not safety conscious and is hostile toward employees who raise safety concerns, and a letter dated August 17, 1999, in which the Staff informed the Licensee that the NRC had identified an apparent instance in which the Licensee discriminated against an employee who had raised safety concerns. In a transcribed telephone conference on February 16, 2000, the Petitioner voiced his concern that, under the NRC's Reactor Oversight Process, a breakdown in the Licensee's corrective action program for a non-safety-related system would not be pursued. The Petitioner was concerned that NRC inspectors might not be able to identify a programmatic breakdown in the corrective action process before such a breakdown affected plant safety.

The Petitioner stated that federal regulations require that the Licensee have an effective corrective action program and provide an environment in which employees are free to raise safety concerns. The Petitioner further stated that

the NRC's Reactor Oversight Process is based on the assumption that both an effective corrective action program and a safety-conscious work environment exist.

III. DISCUSSION

Issue 1: Corrective Action Program

As stated by the Petitioner, NRC inspection reports have noted several discrepancies in the Licensee's corrective action program over the past months; in addition, after receipt of the petition, problems with the implementation of the corrective action program were noted in Inspection Report 99-11, dated March 24, 2000, and in the semiannual plant performance review dated March 31, 2000. The findings of the inspection reports cited by the Petitioner as well as those that were conducted after the date of the petition indicate that the Licensee's corrective action program should be the focus of further inspection efforts.

The Licensee conducted an audit of its corrective action program in early 1999; as a result of both this audit and of weaknesses noted by the NRC, the Licensee made the corrective action program an area of concern and conducted a second audit in late 1999. The second audit was performed by a six-person team headed by PASNY's Quality Assurance Director. The audits identified areas in which improvement is necessary; however, they concluded that the corrective action program meets regulatory requirements.

As a result of its previous inspection findings and the concerns raised by the Petitioner, the NRC focused additional attention on the corrective action program and the work environment at IP3 during a planned problem identification and resolution inspection. This inspection was conducted in May and June of 2000. The report of this inspection was issued on July 7, 2000 (IR-50000286/2000-003). The report concluded that, in general, the Licensee identified, evaluated, and resolved problems effectively using the corrective action program. The inspection determined that the Corrective Action Review Board was effective in achieving consistent DER evaluations and corrective actions. The inspection determined that, in general, the threshold for problem identification was appropriate; however, areas were noted in which additional Licensee attention regarding problem identification was warranted. The inspection also determined that DERs were being resolved properly and that evaluations of problems were largely of good quality; although one exception was noted in which the Licensee's actions were weak and not commensurate with risk significance, evaluations for the most part demonstrated proper consideration for common cause and extent of condition.

In the course of the NRC's May-June 2000 inspection of the Licensee's corrective action program, the Licensee's audits of its own program were reviewed. The findings of the Licensee's audits were consistent with the findings of the

NRC; the audits were also found to contain valuable suggestions for improving the corrective action program.

The NRC inspection findings cited by the Petitioner indicated problems with the Licensee's corrective action program. These findings were of specific weaknesses and did not necessarily indicate a programmatic breakdown. It should be noted that, after being notified of the NRC findings, the Licensee, on its own initiative, conducted an audit of its corrective action program in late 1999. As a result of this audit, the Licensee made specific efforts to improve the corrective action program. These efforts resulted in improvements in the corrective action program, as noted in the July 7, 2000 inspection report. Notwithstanding the noted improvements, the findings cited by the Petitioner, as well as those of inspections conducted after the date of the petition, indicate that additional resources should be allocated to inspecting the Licensee's progress in continuing to improve its corrective action program.

The NRC will continue to inspect the Licensee's corrective action program as part of its plant-specific inspection plan. Because the NRC will continue to focus on this area, because the Licensee's Corrective Action Review Board has proven to be an effective management tool in ensuring consistent DER evaluations and corrective actions, and because the Licensee has shown the willingness and ability to audit and improve its corrective action program as a result of NRC findings, an order mandating another such audit is not warranted.

Issue 2: Safety-Conscious Work Environment

As stated by the Petitioner, the Licensee was informed by the Staff in an August 17, 1999 letter that the NRC had identified an apparent instance of discrimination against an employee who had raised safety concerns. The Petitioner also cited specific allegations made by an employee that the Licensee's ORG does not foster a safety-conscious work environment.

At a predecisional enforcement conference on September 17, 1999, and in a September 29, 1999 letter the Licensee detailed the reasons that it believed that there was no discrimination involved in the instance cited in the NRC's August 17, 1999 letter. This issue has been reviewed under the NRC's enforcement policy and it was determined that enforcement action was not warranted in this case. This decision is documented in the NRC's July 11, 2000 letter to the Licensee.

The employee's allegations regarding the ORG cited by the Petitioner are being reviewed. These issues will be resolved under the NRC's allegation review process. The allegation review process includes routine review of the number of allegations received to identify significant adverse trends requiring additional NRC review. These reviews include consideration of the number of allegations made regarding Licensee's safety-conscious work environment programs.

By letter dated October 23, 1998, the NRC asked the Licensee to describe the actions that it was taking to prevent the temporary revocation of an employee's access to the site following that employee's raising of safety concerns from having a chilling effect on the safety-conscious work environment. By letter dated January 14, 1999, in response to the NRC's letter of October 23, 1998, the Licensee committed to have a nuclear safety culture assessment conducted by an independent organization. This assessment was conducted by SYNERGY Consulting Services and involved employees at both of the Licensee's sites as well as employees at the Licensee's headquarters. The results of the assessment were generally favorable. The results indicated that almost all employees felt free to raise potential nuclear safety concerns. The assessment also showed that a large percentage of employees (95.7%) would escalate safety concerns to a higher level if they were not satisfied with the action taken by their immediate supervisor. The Licensee has stated its intention to contract for another such assessment later this year.

In an inspection report dated July 7, 2000, the NRC documented the results of its May-June 2000 inspection of the work environment at IP3. During the course of this inspection, forty of the Licensee's employees were interviewed to determine whether or not conditions existed that would challenge the establishment and maintenance of a safety-conscious work environment at IP3. The inspection determined that employees accepted and did not feel reluctant to use the DER and other processes to raise safety concerns.

The work environment at IP3 is observed on an almost daily basis by the Resident Inspectors. In addition, review of the safety-conscious work environment is part of an inspection module that is conducted as part of the inspection program. In an inspection report dated July 7, 2000, no significant problems with the Licensee's safety-conscious work environment were noted; furthermore, a 1999 assessment of the Licensee's work environment conducted by an independent organization returned favorable results. Because the work environment is observed routinely by the NRC, because a specific inspection of the safety-conscious work environment is conducted as a part of the inspection program, because recent NRC and contractor evaluations of the Licensee's safety-conscious work environment have shown no significant weaknesses in the Licensee's safety-conscious work environment, because the NRC allegation review process includes review of the number of allegations received to identify significant adverse trends, and because the allegation review process includes consideration of allegations regarding Licensee's safety-conscious work environment programs, ordering the Licensee to conduct an audit of its safety-conscious work environment is not necessary at this time.

IV. CONCLUSION

For the reasons discussed above, the NRC Staff concludes that the issues the Petitioner raised have merit; however, the issues have already been addressed through the Staff and Licensee actions detailed in this Director's Decision. The Staff finds that the Licensee has been generally effective in identifying and correcting defects in the corrective action program and that employees are comfortable raising safety concerns. Because the Petitioner's concerns have effectively been addressed, enforcement action to order the Licensee to conduct the requested audits is not necessary to provide reasonable assurance in the effectiveness of the Licensee's corrective action program and safety-conscious work environment. With the exception of issuing an order, the actions requested by the Petitioner have effectively been granted. Therefore, the Staff's efforts regarding this petition are complete.

A copy of the Decision will be filed with the Secretary of the Commission for the Commission's review in accordance with 10 C.F.R. § 2.206(c). As provided for by that regulation, the Decision will constitute the final action of the Commission 25 days after the date of issuance of the Decision unless the Commission, on its own motion, institutes a review of the Decision within that time.

FOR THE NUCLEAR
REGULATORY COMMISSION

Samuel J. Collins, Director
Office of Nuclear Reactor Regulation

Dated at Rockville, Maryland,
this 26th day of July 2000.

UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

COMMISSIONERS:

Richard A. Meserve, Chairman
Greta Joy Dicus
Nils J. Diaz
Edward McGaffigan, Jr.
Jeffrey S. Merrifield

In the Matter of

Docket No. 72-22-ISFSI

PRIVATE FUEL STORAGE, L.L.C.
(Independent Spent Fuel Storage
Installation)

August 1, 2000

The Commission grants interlocutory appellate review, and affirms in part and reverses in part the Atomic Safety and Licensing Board's decision on financial qualifications. LBP-00-6, 51 NRC 101 (2000). The Commission approves the use of license conditions as an element of an applicant's showing of financial assurance for the construction and operation of a spent fuel storage facility, but requires the Applicant in this case to place in the record a sample service contract so that Intervenors will have a chance to contest the contract's effectiveness in assuring the Applicant's receipt of adequate funds.

INTERLOCUTORY COMMISSION REVIEW

The Commission's general policy is to minimize interlocutory appellate review. The Commission ordinarily grants such review only where the ruling below either threatens a party with "immediate and serious irreparable harm" or "affects the basic structure of the proceeding in a pervasive or unusual manner." 10 C.F.R. § 2.786(g).

INTERLOCUTORY COMMISSION REVIEW

Sometimes interlocutory review is appropriate as an exercise of the Commission's inherent and ongoing supervisory authority over adjudicatory proceedings, particularly where the ruling below raises novel questions that could benefit from early Commission resolution, and where, as the Commission has encouraged in a policy statement, a licensing board has referred a novel issue to the Commission. *Statement of Policy on Conduct of Adjudicatory Proceedings*, CLI-98-12, 48 NRC 18 (1998).

FINANCIAL ASSURANCE: SPENT FUEL STORAGE FACILITIES

The financial requirements for an ISFSI license under Part 72, like the requirements for a fuel facility license under Part 70, are not the same as the financial requirements for reactor licenses under Part 50. Part 50 prescribes in detail precisely what a reactor license applicant must demonstrate, while Part 72 contains no equivalent detail. It simply sets out a broad "financial assurance" command.

FINANCIAL ASSURANCE: SPENT FUEL STORAGE FACILITIES

Outside the reactor context it is sufficient for a license applicant to identify adequate mechanisms to demonstrate reasonable financial assurance, such as license conditions and other commitments.

FINANCIAL ASSURANCE: SPENT FUEL STORAGE FACILITIES

License conditions prohibiting construction or operation of a spent fuel facility if the applicant cannot raise sufficient funds are an appropriate means of bolstering a financial plan, and narrowing the questions at issue in demonstrating financial assurance.

FINANCIAL ASSURANCE: SPENT FUEL STORAGE FACILITIES

A license applicant's additional commitments should be expressly incorporated into the license to eliminate any question about what the commitments are and about whether they are enforceable.

FINANCIAL ASSURANCE: LICENSE CONDITIONS

Using license conditions to establish financial qualifications, and depending on NRC Staff oversight to ensure that the license conditions are met, does not

improperly defer material licensing issues to the post-license inspection process so long as the NRC Staff inquiry is essentially ministerial and by its very nature requires post-hearing resolution.

FINANCIAL ASSURANCE: LICENSE CONDITIONS

License conditions requiring post-hearing verification should be precisely drawn so that NRC Staff inquiry becomes largely a ministerial rather than an adjudicatory act — that is, the Staff verification efforts should be able to verify compliance without having to make overly complex judgments on whether a particular act conforms, as a legal and factual matter, to the promises the applicant has made.

FINANCIAL ASSURANCE: LICENSE CONDITIONS

Evaluating whether promised contractual provisions in fact function as intended is not merely a ministerial act; it calls for legal judgment. In such cases, the applicant should place in the adjudicatory record a sample contract, and give intervenors a chance to contest its adequacy. A board-approved sample contract will serve as guidance to the NRC Staff in later determining whether the applicant has met its financial assurance license commitments.

MEMORANDUM AND ORDER

This case involves a license application to build and operate a temporary spent fuel storage facility in Utah. On March 10, 2000, the Licensing Board issued an order granting (in part) a motion for summary disposition filed by the license applicant, Private Fuel Storage, L.L.C. (“PFS”), on a financial assurance contention, the so-called “Utah E/Confederated Tribes F.” See LBP-00-6, 51 NRC 101 (2000). The Board ruled, among other things, that PFS properly could rely on license conditions to demonstrate adequate financing for construction and operation of its planned facility. Pursuant to 10 C.F.R. § 2.730(f), the Board referred its financial assurance ruling to the Commission. We affirm in part and reverse in part, and remand the financial assurance issue to the Board for further proceedings. We also direct PFS and the NRC Staff to include in PFS’s license several conditions that reflect financial assurance commitments PFS has made in the course of this proceeding.

I. BACKGROUND

PFS is seeking a license to construct and operate an independent spent fuel storage installation (“ISFSI”) on land owned by the Goshute Indian Tribe in Tooele, Utah. PFS is a limited liability company formed by eight members, all of which are nuclear power generating utilities. An admitted contention, labeled Contention Utah E/Confederated Tribes F, alleges that PFS has failed to demonstrate that it is financially qualified to construct and operate the proposed ISFSI, as required under 10 C.F.R. §§ 72.22(e) and 72.40(a)(6). The contention was admitted as follows:

Utah E/Confederated Tribes F — Financial Assurance. Contrary to the requirements of 10 C.F.R. §§ 72.22(e) and 72.40(a)(6), the Applicant has failed to demonstrate that it is financially qualified to engage in the Part 72 activities for which it seeks a license in that:

1. The information in the application about the legal and financial relationship among the owners of the limited liability company (i.e., the license Applicant PFS) is deficient because the owners are not explicitly identified, nor are their relationships discussed. *See* 10 C.F.R. §§ 50.33(c)(2) and 50.33(f) and Appendix C, § II of 10 C.F.R. Part 50.
2. PFS is a limited liability company with no known assets; because PFS is a limited liability company, absent express agreements to the contrary, PFS’s members are not individually liable for the costs of the proposed [PFS facility (PFSF)], and PFS’s members are not required to advance equity contributions. PFS has not produced any documents evidencing its members’ obligations, and thus, has failed to show that it has a sufficient financial base to assume all obligations, known and unknown, incident to ownership and operation of the PFSF; also, PFS may be subject to termination prior to expiration of the license.
3. The application fails to provide enough detail concerning the limited liability company agreement between PFS’s members, the business plans of PFS, and the other documents relevant to assessing the financial strength of PFS. The Applicant must submit a copy of each member’s Subscription Agreement, *see* 10 C.F.R. Part 50, App. C., § II, and must document its funding sources.
4. To demonstrate its financial qualifications, the Applicant must submit as part of the license application a current statement of assets, liabilities and capital structure, *see* 10 C.F.R. Part 50, Appendix C, § II.
5. The Applicant does not take into account the difficulty of allocating financial responsibility and liability among the owners of the spent fuel nor does it address its financial responsibility as the “possessor” of the spent fuel casks. The Applicant must address these issues. *See* 10 C.F.R. § 72.22(e).
6. The Applicant has failed to show that it has the necessary funds to cover the estimated costs of construction and operation of the proposed ISFSI because its cost estimates are vague, generalized, and understated. *See* 10 C.F.R. Part 50, App. C, § II.

7. The Applicant must document an existing market for the storage of spent nuclear fuel and the commitment of sufficient number of Service Agreements to fully fund construction of the proposed ISFSI. The Applicant has not shown that the commitment of 15,000 MTUs is sufficient to fund the Facility including operation, decommissioning and contingencies.
8. Debt financing is not a viable option for showing PFS has reasonable assurance of obtaining the necessary funds to finance construction costs until a minimum value of service agreements is committed and supporting documentation, including service agreements, are provided.
9. The application does not address funding contingencies to cover on-going operations and maintenance costs in the event an entity storing spent fuel at the proposed ISFSI breaches the service agreement, becomes insolvent, or otherwise does not continue making payments to the proposed PFSF.
10. The Application does not provide assurance that PFS will have sufficient resources to cover non-routine expenses, including without limitation the costs of a worst case accident in transportation, storage, or disposal of the spent fuel.

LBP-00-6, 51 NRC at 106-07.

On December 3, 1999, PFS filed a motion seeking summary disposition of Bases 1-5 and 7-10 — i.e., on all issues other than the adequacy of PFS's cost estimates for constructing and operating the proposed ISFSI.

On January 4, 2000, the NRC Staff issued its site-related Safety Evaluation Report ("SER"), in which it found PFS financially qualified to construct and operate the facility, providing two proposed conditions were included in its license. The proposed conditions are as follows:

LC17-1. Construction of the Facility shall not commence before funding (equity, revenue, and debt) is fully committed that is adequate to construct a facility with the initial capacity as specified by PFS to the NRC. Construction of any additional capacity beyond this initial capacity amount shall commence only after funding is fully committed that is adequate to construct such additional capacity.

LC17-2. PFS shall not proceed with the Facility's operation unless it has in place long-term Service Agreements with prices sufficient to cover the operating, maintenance, and decommissioning costs of the Facility, for the entire term of the Service Agreements.

In addition to these license conditions, the Board found that PFS had agreed that it will require each customer to retain title to the spent fuel throughout the storage period; that it will include in each customer service agreement an assignment of legal and financial responsibility between the customers and PFS; that it will "not voluntarily terminate before it has provided all agreed upon spent fuel storage services as required in the service agreements, it has completed its licensing and regulatory obligations under its license, and the license is terminated"; that it will require customers periodically to submit evidence of creditworthiness and provide additional financial assurances, when necessary (such as prepayment, letters of

credit, or a third-party guarantee); and that it will obtain onsite property insurance in the amount of \$70 million and an offsite liability policy in the amount of \$200 million, which is the largest offsite insurance policy commercially available. *See* LBP-00-6, 51 NRC at 137. The Board also found that PFS had committed to making the Service Agreements effective for the entire life of the ISFSI facility. *See id.* at 118; *see also* Applicant’s Motion for Partial Summary Disposition of Utah Contention E and Confederated Tribes Contention F at 9.

PFS’s motion for summary disposition argued that the license conditions and other promises mooted Utah’s concerns in Bases 1-5 and 7-10. The Board agreed that the proposed conditions, additional commitments, and information submitted by PFS mooted all of Contention Utah E except for Basis 6 (“estimated costs of construction and operation”), Basis 10 with respect to the amount of onsite liability insurance, and Basis 5 insofar as it relates to onsite liability. Accordingly, the Board ruled that a hearing would still be held to resolve the estimated costs issue and the potential liability issue. *See* LBP-00-6, 51 NRC at 112-33. The Board referred its ruling for Commission review pursuant to 10 C.F.R. § 2.730(f). *See id.* at 136. The Board deemed a referral to the Commission “warranted” because prior Commission rulings on financial assurance, including one in this very proceeding, lie “[a]t the heart” of the Board’s determination. *Id.* *See Private Fuel Storage, L.L.C.* (Independent Spent Fuel Storage Installation), CLI-98-13, 48 NRC 26, 36 (1998); *Louisiana Energy Services, L.P.* (Claiborne Enrichment Center), CLI-97-15, 46 NRC 294 (1997).

Both PFS and the NRC Staff urge the Commission, if it grants review, to affirm the Board’s ruling.

II. INTERLOCUTORY COMMISSION REVIEW

In the interest of time, the Commission, through its office of the Secretary, ordered the parties to brief both the question whether plenary interlocutory review is appropriate and the merits of the financial assurance issue. We find review appropriate under 10 C.F.R. § 2.730(f), as the Board’s referral of the financial assurance issue presents a novel issue that will benefit from early Commission review. Section 2.730(f) directs presiding officers to refer a ruling to the Commission if, in the judgment of the presiding officer, a “prompt decision is necessary to prevent detriment to the public interest or unusual delay or expense.”

The Commission’s general policy is to minimize interlocutory review. *See, e.g., Carolina Power & Light Co.* (Shearon Harris Nuclear Power Plant), CLI-00-11, 51 NRC 297, 299 (2000); *Sequoyah Fuels Corp.* (Gore, Oklahoma Site), CLI-94-11, 40 NRC 55, 59 (1994). Ordinarily we grant interlocutory review only where the referred ruling either threatens the adversely affected party with “immediate and serious irreparable harm” or “affects the basic structure of

the proceeding in a pervasive or unusual manner.’’ See 10 C.F.R. § 2.786(g). Sometimes, however, interlocutory review is appropriate as an exercise of our inherent and ongoing supervisory authority over adjudicatory proceedings. See, e.g., *Advanced Medical Systems, Inc.* (One Factory Row, Geneva, OH 44041), ALAB-929, 31 NRC 271, 279 (1990) (Appeal Board may exercise discretion to take review of referred ruling where ruling involved question of law that had generic implications and had not been previously addressed on appeal). In our *Statement of Policy on Conduct of Adjudicatory Proceedings*, CLI-98-12, 48 NRC 18, 23 (1998), we encouraged licensing boards and presiding officers to refer to the Commission rulings that present novel questions that could benefit from early resolution.

The policy statement indicated our willingness to exercise our interlocutory review authority in situations such as the one now before us. In *Claiborne*, we approved use of license conditions to demonstrate financial assurance under Part 70 (governing materials licenses). The Board ruling here constitutes a decision of first impression because it extends the *Claiborne* “license conditions” approach to Part 72 ISFSI licenses, the first application of the approach outside the Part 70 context. Early Commission review of the Board decision not only will clarify what, if anything, requires further litigation in the current case, but also may have generic implications for other proceedings, as the question of when a license applicant has met its financial qualification requirements comes up frequently in a variety of contexts. Accordingly, we have decided to review the Board decision, and turn now to the merits of the questions it raises.

III. FINANCIAL ASSURANCE THROUGH LICENSE CONDITIONS

A. Use of License Conditions To Provide Financial Assurance Under Part 72

Whether a license condition may be used to support a finding of reasonable financial assurances under Part 72 of our regulations is a legal question, which we review *de novo*. See *Sequoyah Fuels Corp.* (Gore, Oklahoma Site), CLI-97-13, 46 NRC 195, 206 (1997). We agree with the Board that license conditions can be an acceptable method for providing reasonable assurance of financial qualifications under 10 C.F.R. Part 72.

As we mentioned above, the Board’s view derives from early guidance we gave in this very case. See CLI-98-13, 48 NRC at 36-37. There, we encouraged the Board and the parties to consider the use of license conditions to satisfy certain Part 72 financial assurance requirements, much in the same way license conditions were used to eliminate certain concerns over the applicant’s financial assurance under Part 70 in *Claiborne*. In its appellate brief, the State of Utah presents two arguments why a license condition should not be used to satisfy

financial assurance requirements of Part 72. First, Utah says that the Board mistakenly “equated” the financial provisions of Part 72 with those of Part 70. Second, it claims that the Board “erroneously concluded that the level of risk posed by the PFS facility was more comparable to a uranium enrichment plant than a nuclear power plant.” Neither argument is persuasive.

In support of its first argument, Utah attempts to distinguish between the financial requirements for an ISFSI license (Part 72) and the requirements for the fuel-facility materials license at issue in *Claiborne* (Part 70). In setting the financial qualifications standard that an applicant must meet, Part 70 uses the phrase “appears financially qualified,” rather than the phrase “possesses . . . or has reasonable assurance of obtaining [the necessary funds],” which is found in Part 72. See 10 C.F.R. § 72.22(e). In *Claiborne*, the Commission pointed to differences in language between Part 70’s “appears financially qualified” clause and Part 50’s language, which, like Part 72, uses “reasonable assurance” terminology. We concluded in *Claiborne* that the “appears financially qualified” standard is “more flexible” than the detailed Part 50 standard. See 46 NRC at 299-300. However, nowhere in *Claiborne* did we state or imply that a carefully drawn license condition could not, in combination with reasonable cost estimates, provide “reasonable assurance” — even outside the Part 70 context examined in *Claiborne* — that the applicant will have sufficient funds to construct and operate a licensed facility safely.

Utah is incorrect in its assertion that the Board failed to address the implication of the facial difference in the language of Part 70 and Part 72. The Board did address the language variance between the two parts, and found — we think correctly — that it alone did not answer the question whether license conditions can provide sufficient financial assurance under Part 72. See LBP-00-6, 51 NRC at 113-14. Utah maintains that the Board should have looked to the comprehensive reactor financial assurance requirements found in Part 50 as “guidance” for what is necessary for ISFSI financial assurance. But, while both Part 72 and Part 50 call for “financial assurance” showings, the two parts differ considerably on what must be shown. Part 50 prescribes in detail precisely what a reactor license applicant must demonstrate. See 10 C.F.R. § 50.33(f); 10 C.F.R. Part 50, Appendix C. Part 72, by contrast, contains no equivalent detail; it simply sets out a broad “financial assurance” command. See 10 C.F.R. § 72.22(e). Part 72, in other words, provides flexibility that Part 50 does not.

Thus, as we held in *Claiborne*, outside the reactor context it is sufficient for a license applicant to identify adequate mechanisms to demonstrate reasonable assurance, such as license conditions and other commitments. We will not require such applicants to meet the detailed Part 50 requirements.

Our flexible approach to financial assurance in nonreactor cases appropriately reflects differing levels of risk. Utah, though, argues that the Board erroneously found that an ISFSI presents safety risks more closely comparable to a uranium

enrichment plant, like the one at issue in *Claiborne*, than to a nuclear power reactor. According to Utah, the risks of an ISFSI are as great as those of a reactor, and therefore PFS should make the same type of detailed financial showing required of reactor license applicants under Part 50. We disagree with Utah and find the Board's risk calculus reasonable. As the Board pointed out, the Commission has previously stated that a spent fuel storage facility, which holds fuel that has been cooled for at least 1 year and is not subject to dispersive forces associated with high temperatures and pressure, has a much smaller potential for serious accidents than a power reactor. *See* LBP-00-6, 51 NRC at 114-16; *see also* 60 Fed. Reg. 20,879 (1995).¹

Claiborne should not be interpreted, however, to hold that where the danger to public health and the environment presented by a proposed facility is not as great as the danger presented by a nuclear reactor, the Commission will grant a license to an applicant of dubious financial qualifications. Under the *Claiborne* approach, we still consider the financial prospects of the proposed licensee, but we do not hold the license applicant to Part 50-style specific means of showing financial capability. *Claiborne*, for example, holds that the NRC need not require detailed guarantees for financial backing when it has other means at its disposal, such as license conditions, that make underfunding unlikely.

As we held in *Claiborne*, the requirement that a party provide reasonable financial assurance does not require an ironclad guarantee of future business success. *See* CLI-97-15, 46 NRC at 307. Even when evaluating financial assurance under Part 50,

The Commission will accept financial assurances based on plausible assumptions and forecasts, even though the possibility is not insignificant that things will turn out less favorably than expected. Thus, the mere casting of doubt on some aspects of proposed funding plans is not by itself sufficient to defeat a finding of reasonable assurance.

North Atlantic Energy Service Corp. (Seabrook Station, Unit 1), CLI-99-6, 49 NRC 201, 222 (1999). Thus, where a license applicant depends upon contractual and other commitments for financial assurance, we do not reject the showing out of hand or require litigation on the feasibility of those aspects of the applicant's financial plan or economic prospects. Here, the PFS license conditions are such that the facility will not be built or operated if PFS cannot raise sufficient funds.

¹In the statement of considerations supporting a 1995 rulemaking that revised Part 72, the Commission responded to a comment that the standards should be the same for ISFSI licensing as for a nuclear power license:

The potential ability of irradiated fuel to adversely affect the public health and safety and the environment is largely determined by the presence of a driving force behind dispersion. Therefore, it is the absence of such a driving force, due to the absence of high temperature and pressure conditions in an ISFSI (unlike a nuclear reactor operating under such conditions that could provide a driving force), that substantially eliminate the likelihood of accidents involving a major release of radioactivity from spent fuel stored in an ISFSI.

60 Fed. Reg. 20,883 (1995).

Further, the cost assumptions, which are a critical part of the funding plan, are subject to litigation before the Board. *See* LBP-00-6, 51 NRC at 123 n.9. Under *Claiborne*, such conditions are an appropriate means of bolstering a financial plan, and narrowing the questions at issue in demonstrating financial assurance. We therefore affirm the Board's decision in LBP-00-6 insofar as it approves use of license conditions as part of PFS's showing of financial assurance to operate an ISFSI facility under Part 72.

B. Additional License Conditions

In addition to the two proposed license conditions, the Board also relied on other commitments offered by PFS during the licensing process. *See* LBP-00-6, 51 NRC at 137-38.² Utah argues that these additional commitments amount to bald promises that offer no assurance of being fulfilled. While we disagree with Utah's suggestion that an applicant has no enforceable obligation to stand behind representations made during the licensing process, we hold here, as we have in other similar cases, that the additional conditions should be expressly incorporated into the PFS license in order to eliminate any ambiguity as to what PFS's commitments are and to eliminate any question about whether these promises are fully enforceable. *See, e.g., Claiborne*, 46 NRC at 308-09.

In addition, because PFS has stated that it will make the term of the service agreements cover the entire term of the license (*see* Applicant's Motion for Partial Summary Disposition of Utah Contention E and Confederated Tribes Contention F, at 9), proposed license condition LC 17-2 should be revised to read as follows: "PFS shall not proceed with the Facility's operation unless it has in place Service Agreements covering the entire term of the license, with prices sufficient to cover the operating, maintenance, and decommissioning costs of the Facility for the entire term of the license."

²The additional commitments are to:

1. Incorporate into its customer service agreements (member and nonmember) provisions that mandate:
 - a. PFS will not voluntarily terminate before it has provided all agreed upon spent fuel storage services as required in the service agreements, it has completed its licensing and regulatory obligations under its license, and the license is terminated;
 - b. An assignment of legal and financial responsibility between the customer, as the owner of the spent fuel, and PFS, including an acknowledgment that each customer must retain title to its fuel throughout the storage period;
 - c. Customers will be required to (i) periodically provide pertinent financial information; (ii) meet creditworthiness requirements; and (iii) provide PFS with any necessary additional financial assurances (e.g., an advance payment, irrevocable letters of credit, third-party guarantee, or payment and performance bond); and
2. Obtain an offsite liability policy in the amount of \$200 million, i.e., a policy that matches the largest commercially available offsite insurance coverage available.

51 NRC at 137.

C. Right to a Hearing

Utah argues that the Board's decision violates its right to a hearing by "relegating financial qualification determinations to an inspection process in which the State has no role." Utah complains that under PFS's "license conditions" approach to financial assurance, an NRC inspector, after licensing, will have to resolve complex financial issues to determine whether PFS has in fact complied with the conditions, without input from Utah or from any other Intervenor. This, says Utah, improperly truncates its hearing right.

We find Utah's general argument overbroad. Using license conditions to establish financial qualifications, and depending on NRC Staff oversight to ensure that the license conditions are met, does not improperly defer material licensing issues to the post-license inspection process.³ If the determination necessary for licensing were whether PFS actually has in hand sufficient funds for construction and operations, then issuing the license on the strength of license conditions would be improper. But the material issue here is whether PFS has shown, to a reasonable degree, that it *will* have sufficient funds prior to construction and operation, not whether it already has the funds. This is an issue that can be resolved through appropriate license conditions, as we held in *Claiborne*, with compliance to be determined by the NRC Staff after licensing.

Longstanding agency practice holds that matters may be left to the NRC Staff for post-hearing resolution "where hearings would not be helpful and the Board can 'make the findings requisite to issuance of the license.'" *Long Island Lighting Co.* (Shoreham Nuclear Power Station, Unit 1), ALAB-788, 20 NRC 1102, 1159 (1984), quoting *Consolidated Edison Co. of New York* (Indian Point Station, Unit 2), CLI-74-23, 7 AEC 947, 951 (1974). Post-licensing resolution is appropriate for matters where a hearing would be unlikely to affect the result. See *Southern California Edison Co.* (San Onofre Nuclear Generating Station, Units 2 and 3), LBP-82-39, 15 NRC 1163, 1216 (1982) (relying on *Indian Point Station*). The key to the validity of post-licensing Staff reviews is whether the NRC Staff inquiry is essentially "ministerial" and "by [its] very nature require[s] post-licensing verification." See *Hydro Resources, Inc.* (2929 Coors Road, Suite 101, Albuquerque, NM 87120), CLI-00-8, 51 NRC 227, 240 (2000).

³ Utah cites *Union of Concerned Scientists v. NRC*, 735 F.2d 1437 (D.C. Cir. 1984), to support its view that post-licensing verification of compliance with financial license conditions unlawfully excludes material issues from the licensing hearing. But *Union of Concerned Scientists* is readily distinguishable from our case. There, the court of appeals struck down an agency rule excluding the results of emergency preparedness tests from NRC hearings, test results that the NRC's own rules made material to licensing. Here, by contrast, no NRC rule makes NRC Staff review of compliance with financial license conditions material to licensing. The important question in a case like ours, as *Union of Concerned Scientists* suggests, is whether the NRC Staff inspectors are expected to engage in "ministerial"-type compliance checks not suitable for hearings or are expected to themselves exercise a form of adjudicatory discretion. See 735 F.2d at 1449. As we explain below, here we lack sufficient information to answer that question, and therefore direct the Board to further consider it after obtaining additional information.

Here, we cannot definitively answer that question, for as Utah rightly points out, all we have are abstract promises by PFS that it will obtain contracts and other financial commitments guaranteeing the necessary funds. The PFS commitment leaves the nature of the NRC Staff's post-licensing inquiry uncertain. As Utah stresses, PFS has produced no draft of the proposed long-term service agreements on which the Board based its finding of reasonable financial assurance. In these circumstances, we cannot be sure, within acceptable bounds, what the agreements' terms will be, how inviolate their provisions will be, and how easy it will be for NRC verification reviews to determine compliance. This is not to say that the Staff is allowed no room to exercise professional judgment in conducting post-licensing verification activities. However, sufficient details should be provided in the license so that the Staff's review is not subject to meaningful debate.

Among other things, Utah points to the possibility that PFS will draw up service agreements with "loopholes" — e.g., agreements that would allow its members and customers to avoid paying for their spent fuel storage costs, leaving the facility underfunded, or agreements that would allow PFS itself to voluntarily dissolve, leaving the facility, still containing spent fuel, without an owner and operator. Although the Board found that the service contracts could reasonably ensure that these things will not happen, Utah contends that verifying that the relevant provisions are in the service contracts may require legal and factual judgments going beyond "ministerial" testing and inspection. On this point we agree with Utah.

To reconcile post-hearing verification of a license condition by the NRC Staff with cases like *Union of Concerned Scientists*, *Shoreham*, and *Indian Point Station*, we must insist that the condition be precisely drawn so that the verification of compliance becomes a largely ministerial rather than an adjudicatory act — that is, the Staff verification efforts should be able to verify compliance without having to make overly complex judgments on whether a particular contract provision conforms, as a legal and factual matter, to the promises PFS has made. The Board's finding of reasonable financial assurance rested largely on PFS's promises not to commence operations prior to obtaining service contracts that included certain provisions designed to ensure that PFS's customers and members could not easily avoid payments while leaving their spent fuel on PFS's hands. Because the Board's finding turned on the inclusion of certain provisions in the contracts, the wording of the contracts is crucial. But no sample or model service agreements appear in the record, and we are in no position to determine whether the NRC Staff verification role will be relatively straightforward — a simple determination whether promised provisions appear in the contracts — or will require difficult discretionary judgments.

In short, evaluating whether contract provisions in fact function as intended is not merely a ministerial act; it calls for legal judgment.⁴ We think the Board went too far in putting evaluation of the legal effectiveness of service agreements into the hands of the NRC Staff without itself reviewing a sample service contract.⁵ We have no doubt that a Board-approved and carefully worded model service contract would suffice as guidance to the NRC Staff in later determining whether PFS has met its financial assurance license commitments. This does not mean that PFS must slavishly incorporate into every contract the exact wording of the sample contracts. Rather, the sample contract is meant to provide guidelines that readily allow the Staff to determine during its verification review that the contents of actual contracts negotiated by PFS meet the Commission's expectations as reflected in the license.⁶

Accordingly, we reverse, in part, the Board's grant of summary disposition and remand the financial assurance issue with the direction that the Board (1) require PFS to produce a sample service contract that meets all financial assurance license conditions, and (2) give Intervenors an opportunity to address the adequacy of the service contract to meet the concerns raised in Contention E. If Intervenors do not raise further objections after reviewing the sample contract, or if the Board finds intervenors' objections insubstantial, then PFS would be entitled to summary disposition on Utah Contention E. Otherwise, the contention should be set for hearing.

The Board thus far has managed the scheduling of this case in exemplary fashion, and we thus leave to the Board's sound discretion the scheduling of further filings on the remanded financial assurance issue. We anticipate that the additional proceedings necessitated by this remand will not delay ultimate resolution of this licensing case or unduly interfere with the Board's current hearing schedule.

⁴ Among the provisions that must be in the service agreements are provisions that PFS will not voluntarily dissolve prior to providing the agreed services, a provision that the customer retains title to the spent fuel and an allocation of liability among customers and PFS for any liability associated with the fuel, and provisions requiring the customer to submit to credit checks and provide additional financial assurances.

⁵ In its December 15, 1999 statement of position regarding Utah Contention E, Basis 3, the NRC Staff agreed that without a draft or sample service agreement to look at, it was not possible to reach a finding that entering such contracts would provide reasonable financial assurances. See LBP-00-6, 51 NRC at 123 n.8. The Staff further noted that this issue will be resolved upon PFS's compliance with the Staff's proposed license conditions. *Id.*

⁶ This is analogous to the Commission's post-licensing reviews of financial assurance documents for materials licensees. For those reviews, Regulatory Guide 3.66, Standard Format and Content of Financial Assurance Mechanisms Required for Decommissioning Under 10 CFR Parts 30, 40, 70, and 72, provides sample contract language for financial assurance documents. While few bonds or letters of credit from banks use the exact language of the Regulatory Guide, it serves as adequate guidance to the Staff to ensure that the contractual documents provide the financial assurance intended by the Commission. Here, the sample contract, approved through the hearing process, will provide similar guidance for Staff use.

IV. CONCLUSION

For the foregoing reasons, the Licensing Board's ruling on financial qualifications in LBP-00-6 is affirmed in part, reversed in part, and remanded for further proceedings consistent with this opinion. In addition, we direct the NRC Staff and PFS to include in PFS's license, as license conditions, promises made by PFS during the licensing process and in support of its motion for summary judgment, including its commitments:

not to commence construction before funding, in the amount to be determined at hearing, is adequately committed;

not to commence operations before service agreements for the life of the license, with prices adequate to fund operations, maintenance, and decommissioning, in the amount to be determined at hearing, are in place;

to include provisions in service agreements requiring customers to retain title to the spent fuel stored and allocating liability among PFS and the customers;

to include provisions in the Service Agreements requiring customers to provide periodically credit information, and, where necessary, additional financial assurances such as guarantees, prepayment, or payment bond;

to include in the customer service agreements a provision requiring PFS not to terminate its license prior to furnishing the spent fuel storage services covered by the service agreement;

to obtain insurance for offsite liability in the amount of \$200 million (the maximum amount commercially available); and,

to obtain insurance covering onsite liability in an amount to be determined at hearing.

IT IS SO ORDERED.

For the Commission⁷

ANNETTE L. VIETTI-COOK
Secretary of the Commission

Dated at Rockville, Maryland,
this 1st day of August 2000.

⁷ Chairman Meserve and Commissioner Diaz were not available for affirmation to this Memorandum and Order. Had they been present, they would have affirmed the Memorandum and Order.

UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

COMMISSIONERS:

Richard A. Meserve, Chairman
Greta Joy Dicus
Nils J. Diaz
Edward McGaffigan, Jr.
Jeffrey S. Merrifield

In the Matter of

Docket Nos. 50-263-LT
50-282-LT
50-306-LT
72-10-LT
(consolidated)

NORTHERN STATES POWER
COMPANY
(Monticello Nuclear Generating Plant;
Prairie Island Nuclear Generating
Plant, Units 1 and 2;
Prairie Island Independent Spent
Fuel Storage Installation)

August 1, 2000

This proceeding concerns two applications for approval of license transfers. The Commission finds that all three Petitioners to intervene have demonstrated standing but that none has proffered an admissible issue. Therefore, the Commission denies their requests for hearing. However, as part of the Commission's rationale is arguably new to the Petitioners, the Commission affords them the opportunity to seek reconsideration of this Order and to present arguments against the Commission's reasoning.

RULES OF PRACTICE: INTERVENTION (STANDING)

LICENSE TRANSFER

For a petitioner to demonstrate standing in a Subpart M license transfer proceeding, the petitioner must

- (1) identify an interest in the proceeding by
 - (a) alleging a concrete and particularized injury (actual or threatened) that
 - (b) is fairly traceable to, and may be affected by, the challenged action (the grant of an application), and
 - (c) is likely to be redressed by a favorable decision, and
 - (d) lies arguably within the “zone of interests” protected by the governing statute(s).
- (2) specify the facts pertaining to that interest.

See 10 C.F.R. §§ 2.1306, 2.1308; *Niagara Mohawk Power Corp.* (Nine Mile Point Nuclear Station, Units 1 and 2), CLI-99-30, 50 NRC 333, 340-41 & n.5 (1999) (and cited authority).

RULES OF PRACTICE: INTERVENTION (STANDING)

LICENSE TRANSFER

An organization seeking representational standing must demonstrate how at least one of its members may be affected by the licensing action (such as by activities on or near the site), must identify that member by name and address, and must show (preferably by affidavit) that the organization is authorized to request a hearing on behalf of that member. *See GPU Nuclear, Inc.* (Oyster Creek Nuclear Generating Station), CLI-00-6, 51 NRC 193, 202 (2000) (and authority cited therein).

RULES OF PRACTICE: INTERVENTION (STANDING)

LICENSE TRANSFER

In a license transfer case where (as here) nearby Petitioners plausibly claim that underfunding or other deficiencies may result in a general safety risk affecting their persons or property, they should have the opportunity to seek a hearing on their merits arguments. We therefore conclude that the Petitioners in this proceeding have satisfied our standing requirements. *See Oyster Creek*, 51 NRC at 202-03.

LICENSE TRANSFER

RULES OF PRACTICE: ADMISSIBILITY OF ISSUES; INTERVENTION (ADMISSIBILITY OF ISSUES)

To demonstrate that issues are admissible under Subpart M, a petitioner must

- (1) set forth the issues (factual and/or legal) that petitioner seeks to raise,
- (2) demonstrate that those issues fall within the scope of the proceeding,
- (3) demonstrate that those issues are relevant and material to the findings necessary to a grant of the license transfer application,
- (4) show that a genuine dispute exists with the applicant on a material issue of law or fact, and
- (5) provide a concise statement of the alleged facts or expert opinions supporting petitioner's position on such issues, together with references to the sources and documents on which petitioner intends to rely.

See 10 C.F.R. §§ 2.1306, 2.1308; *Nine Mile Point*, CLI-99-30, 50 NRC at 342 (and cited authority). As the Commission stated in *Oyster Creek*, CLI-00-6, 51 NRC at 203 (citations omitted):

These standards do not allow mere "notice pleading;" the Commission will not accept "the filing of a vague, unparticularized" issue, unsupported by alleged fact or expert opinion and documentary support. General assertions or conclusions will not suffice. This is not to say that our threshold admissibility requirements should be turned into a "fortress to deny intervention." The Commission regularly continues to admit for litigation and hearing issues that are material and are adequately supported.

FINANCIAL QUALIFICATIONS

LICENSE TRANSFER

10 C.F.R. § 50.33(f)

RULES OF PRACTICE: INTERVENTION (ADMISSIBILITY OF ISSUES)

Nuclear Management (the proposed nonowner operator of the plants at issue in this proceeding) has, in effect, made the necessary showing of financial qualifications because of its cost-passthrough contract with Northern States, an electric utility with guaranteed rate-backed revenues.

Section 182a of the AEA gives the Commission considerable flexibility in determining what kinds of qualifications are needed for particular kinds of licenses. Specifically, that section charges us to review "such of the technical and financial qualifications of the applicant . . . as the Commission may deem appropriate for the license." 42 U.S.C. § 2232(a). Our financial qualification rule, section 50.33(f), does not expressly address the form of transaction at

issue here — where an operating license is split, in effect, between an electric utility “owner” and a nonutility “operator.” But, consistent with congressional intent, the rule contains enough flexibility to allow for an appropriate financial qualification review. Section 50.33(f), in its introductory paragraph, demands only “information sufficient to demonstrate” an applicant’s financial qualifications “to carry out . . . the activities for which the permit or license is sought.” And the same paragraph indicates that the detailed information-filing requirements contained elsewhere in section 50.33(f) (*see* subsections (1), (2), and (3)) come into play only “as applicable.”

We find the detailed requirements of sections 50.33(f)(2) and (f)(3) not “applicable” to Nuclear Management. Our view is rooted in three factors: (1) the nature of Nuclear Management’s licensed “activities” — i.e., operating the Prairie Island and Monticello plants, not funding them; (2) Northern States’s electric utility status; and (3) Northern States’s contractual commitment to assume full financial responsibility for funding the safe operation, maintenance, and decommissioning of the plants.

In the context of this case, a detailed examination of Nuclear Management’s costs, resources, and corporate structure, as contemplated by sections 50.33(f)(2) and (f)(3), is unnecessary to meet the objectives of the rule. It is Northern States’s contractual duty, not Nuclear Management’s, to fund safe operation of the Monticello and Prairie Island plants. And Northern States’s ability to pay the costs of running the plants safely has not been called into serious question. Because Northern States is an electric utility regulated by the Minnesota Public Utilities Commission, it has reasonable assurance of receiving sufficient rate revenue to fund the safe operation of its plants. Indeed, our regulations presume that rate-regulated utilities like Northern States are financially qualified to own or operate nuclear power plants, and therefore expressly exempt them from a further financial qualification showing. *See* 10 C.F.R. § 50.33(f) (“electric utility” exception). *See* Final Rule, “Elimination of Review of Financial Qualifications of Electric Utilities in Operating License Review and Hearings for Nuclear Power Plants,” 49 Fed. Reg. 35,747, 35,749 (“the rate process . . . assure[s] that regulated utilities will have the financial resources needed to operate safely”) (Sept. 12, 1984).

It is true that the proposed licensed plant operator, Nuclear Management, is not itself an electric utility, but the combination of the state regulator’s revenue guarantee to Northern States *and* Northern States’s own service agreement with Nuclear Management providing for cost passthrough offers reasonable assurance as to the payment of Nuclear Management’s costs, and allows us to find in the current record “information sufficient to demonstrate [Nuclear Management’s] financial qualification . . . to carry out . . . the activities for which the . . . license is sought.” 10 C.F.R. § 50.33(f). Even the bankruptcy of Nuclear Management presumably would not endanger the public health and safety, for

Northern States would remain both obliged and able to fund the plants' continued safe operation (or safe shutdown). For these reasons, we find Nuclear Management financially qualified based on the current record, see no reason for further hearing on Petitioners' financial contentions, and conclude that the financial aspects of transferring the plants' operating licenses to Nuclear Management will not place in jeopardy the public health and safety.

PETITION FOR RECONSIDERATION

We acknowledge that Petitioners arguably have not had a full opportunity to address the *precise* theory on which we rest today's finding that Nuclear Management is financially qualified. Thus, we grant Petitioners permission to file a consolidated request for reconsideration within 10 business days of the date of this Order. *Cf.* 10 C.F.R. §§ 2.771, 2.786(e). *See generally Louisiana Energy Services, L.P.* (Claiborne Enrichment Center), CLI-96-8, 44 NRC 107, 110 n.2 (1996). Applicants may file a response within 10 business days of receiving from Petitioners any such request.

FINANCIAL QUALIFICATIONS

LICENSE TRANSFER

10 C.F.R. § 72.22(e)(2), (3)

RULES OF PRACTICE: INTERVENTION (ADMISSIBILITY OF ISSUES)

Nuclear Management has demonstrated the necessary financial qualifications to operate the ISFSI by providing assurances that Northern States will continue to pay the operation and maintenance expenses for the ISFSI. Because Northern States's own status as an electric utility remains unchanged, there will be no change in the financial qualifications of the party ultimately responsible for the safe operation, maintenance, and decommissioning of the ISFSI. Moreover, Northern States has committed in its Nuclear Power Plant Operating Services Agreement with Nuclear Management to continue financing the decommissioning trust funds, and as an electric utility it retains its rate-based ability to finance those funds.

FINANCIAL QUALIFICATIONS

LICENSE TRANSFER

10 C.F.R. § 50.33(f)

RULES OF PRACTICE: INTERVENTION (ADMISSIBILITY OF ISSUES)

The rationale for the electric utility exception is equally applicable to future utilities as it is to existing ones — i.e., the ratemaking process (federal and/or state) provides reasonable assurance that the utilities will have access to the funds necessary to operate their facilities safely.

FINANCIAL QUALIFICATIONS

LICENSE TRANSFER: NEWLY FORMED ENTITY

10 C.F.R. § 50.33(f)(3)

RULES OF PRACTICE: INTERVENTION (ADMISSIBILITY OF ISSUES)

Moreover, the fact that New NSP (the proposed new owner of the plants being transferred) is a “newly formed entity” is beside the point. Although section 50.33(f)(3) imposes certain additional financial-information requirements on “newly formed entities,” these requirements are subject to the same electric-utility exception cited above. Consequently, those additional requirements do not apply to New NSP.

FINANCIAL QUALIFICATIONS

LICENSE TRANSFER

10 C.F.R. § 72.22(e)

RULES OF PRACTICE: INTERVENTION (ADMISSIBILITY OF ISSUES)

Section 72.22(e) of our regulations sets forth the financial qualifications requirements for the owner or operator of an ISFSI. Unlike section 50.33(f), it neither specifies particular information-filing requirements nor includes an explicit “electric utility” exception.

**RULES OF PRACTICE: ADMISSIBILITY OF ISSUES;
INTERVENTION (ADMISSIBILITY OF ISSUES)**

Mere conclusions or assertions do not suffice to establish admissible issues under Subpart M. See *Oyster Creek*, CLI-00-6, 51 NRC at 203.

FINANCIAL QUALIFICATIONS

LICENSE TRANSFER

10 C.F.R. § 50.33(f)

**RULES OF PRACTICE: INTERVENTION (ADMISSIBILITY
OF ISSUES)**

Where Nuclear Management (the proposed operator) expects to employ substantially the same personnel and use essentially the same onsite organizations as are now employed and used by Northern States, we see no grounds on which to question the technical qualifications of either New NSP (the proposed new owner) or Nuclear Management

FINANCIAL QUALIFICATIONS

LICENSE TRANSFER

10 C.F.R. § 50.90

**RULES OF PRACTICE: INTERVENTION (ADMISSIBILITY
OF ISSUES)**

Section 50.90 provides, in relevant part, that the licensee “follow[] as far as applicable, the form prescribed for original applications.” The inclusion of the phrase “as far as applicable” makes clear that we do not require applicants to follow slavishly the form for original applications.

FINANCIAL QUALIFICATIONS

LIMITED LIABILITY COMPANIES

10 C.F.R. § 50.40(b)

In *Oyster Creek*, CLI-00-6, 51 NRC at 208, an intervenor had asserted “that a limited liability company is ‘inherently unqualified to own and operate’ a nuclear power plant.” We disagreed, ruling that limited liability companies are no different from corporations in that both are legally structured to limit the liability

of their shareholders, and that the Commission has issued reactor licenses to such limited liability organizations for decades.

NATIONAL ENVIRONMENTAL POLICY ACT

LICENSE TRANSFER

RULES OF PRACTICE: INTERVENTION (ADMISSIBILITY OF ISSUES)

10 C.F.R. § 51.22(c)(21)

Because the Commission has made a generic determination that license transfers will not have a significant effect on the environment (*see* 10 C.F.R. § 51.22(c)(21)), and because Petitioners have given us no reason to determine otherwise in this proceeding, we conclude that NEPA issues are not germane to this license transfer proceeding.

PRICE ANDERSON ACT

LICENSE TRANSFER

RULES OF PRACTICE: INTERVENTION (ADMISSIBILITY OF ISSUES)

Sections 140.1, 140.2(a), 140.10, and 140.11(a) of 10 C.F.R. call only for “licensees” to maintain financial protection.

MEMORANDUM AND ORDER

This proceeding involves two license transfer applications by Northern States Power Company (“Northern States”).¹ Both applications were submitted pursuant to section 184 of the Atomic Energy Act of 1954 (“AEA”)² and section 50.80 of the Commission’s regulations.³

¹ Although the Commission ordinarily considers applications separately, we consolidate the proceedings that address these two applications because they share so many issues and involve the same four facilities.

² 42 U.S.C. § 2234 (precluding the transfer of any NRC license unless the Commission both finds the transfer in accordance with the AEA and gives its consent in writing).

³ 10 C.F.R. § 50.80. This regulation reiterates the requirements of AEA § 184, sets forth the filing requirements for a license transfer application, and establishes the following test for approval of such an application: (1) the proposed transferee is qualified to hold the license and (2) the transfer is otherwise consistent with law, regulations, and Commission orders.

The first application, dated October 29, 1999, seeks authorization for the transfer of the Facility Operating Licenses for three facilities — the Monticello Nuclear Generating Plant (“Monticello”) and the Prairie Island Nuclear Generating Plants (Units 1 and 2; collectively “Prairie Island”) — and the Materials License for the Prairie Island Independent Spent Fuel Storage Installation (“Prairie Island ISFSI”).⁴ Northern States proposes to transfer these licenses to a newly formed entity that will also carry the name “Northern States Power Company” but which, for the sake of avoiding confusion, is denominated “New NSP” for purposes of this proceeding.

On March 24, 1999, Northern States entered into an agreement to merge with New Century Energy, Inc. The resulting entity will be named Xcel Energy, Inc. At the time of the merger, Northern States will transfer to New NSP all of Northern States’s existing electric and natural gas utility facilities, as well as all responsibility for and control over operations of those facilities. New NSP will be a wholly owned subsidiary of Xcel, will be an electric utility under 10 C.F.R. § 50.2, will assume title to the facilities following approval of the proposed license transfer, will employ the same facility personnel that Northern States currently employs, and will (at least according to the first application) become responsible for the operation, maintenance, and eventual decommissioning of the four facilities. The application proposes no physical or operational changes to the facilities other than the transfer of operating authority to New NSP. *See* Northern States’s Answer to Ms. Overland’s Petition Regarding the New NSP Application, dated March 9, 2000, at 2-3.

On February 10, 2000, the Commission published notices of this application in the *Federal Register*. 65 Fed. Reg. 6641 (Monticello facility), 6642 (Prairie Island facilities). In those notices, the Commission set a deadline of March 1, 2000, by which interested persons could seek to intervene and request a hearing on Northern States’s October 29th application.

In a second (and related) application dated November 24, 1999, Northern States seeks authorization to transfer to a new entity, Nuclear Management Company, LLC (“Nuclear Management”), the operating authority for the four facilities.⁵ Northern States indicates that substantially all of its operating personnel

⁴This application also requests NRC approval of the transfer of Northern States’s Part 30 byproduct materials licenses to New NSP. Those transfers are not challenged in this proceeding.

⁵Approval of both applications would permit either New NSP or Nuclear Management to operate the facilities at issue. Northern States would thus be free to transfer operating authority to either of these entities. Were Northern States to transfer operating authority to New NSP at the outset, any subsequent transfer of operational authority to Nuclear Management would necessarily be from New NSP, and could not go into effect without our granting yet another application — seeking approval of the subsequent transfer *from New NSP*. We understand that Northern States expects to complete the transfer of the licenses to New NSP (through the merger with New Century Energy, Inc.) prior to any transfer of operating authority to Nuclear Management. Hence, it would appear that Northern States wants New NSP to have the authority to operate the plant prior to (or in the absence of) any Commission’s approval

(Continued)

dedicated to the four facilities will be transferred to Nuclear Management, either as employees of that latter company or as Northern States employees under the supervision of Nuclear Management. The application proposes no physical or operational changes to the facilities other than the transfer of operating authority to Nuclear Management. *See* Northern States's Answer to Ms. Overland's Petition Regarding the Nuclear Management Application, dated March 9, 2000, at 2-4.

On February 15, 2000, the Commission published notices of this application in the *Federal Register*. *See* 65 Fed. Reg. 7574. These notices set a deadline of March 6, 2000, for intervention petitions and hearing requests regarding Northern States's November 24th application.

On February 27, 2000, Ms. Carol A. Overland filed petitions to intervene and requests for hearing regarding both applications and all facilities at issue. On February 29, 2000, the North American Water Office ("the Water Office") filed two petitions to intervene and requests for hearing which were, in most respects, the same as those of Ms. Overland. On March 6, 2000, the Prairie Island Indian Community ("the Indian Community") likewise submitted a similar petition and request concerning the two proposed Prairie Island license transfers to Nuclear Management. However, the Indian Community did not oppose the transfer to New NSP, nor did it oppose transfers involving the Monticello plant.

Northern States filed answers to these petitions and requests pursuant to 10 C.F.R. § 2.1307(a). All three Petitioners filed replies pursuant to 10 C.F.R. § 2.1307(b). The Staff has chosen not to participate as a party in the adjudicatory portion of the proceeding. *See generally* 10 C.F.R. § 2.1316(b), (c). We consider the petitions under Subpart M of our procedural rules. *See* 10 C.F.R. §§ 2.1300 *et seq.*

I. DISCUSSION

To intervene as of right in any Commission licensing proceeding, a petitioner must demonstrate that its "interest may be affected by the proceeding," i.e., it must demonstrate "standing." *See* AEA § 189a, 42 U.S.C. § 2239(a); 10 C.F.R. §§ 2.1306, 2.1308. The Commission's rules for license transfer proceedings also require that a petition to intervene raise at least one admissible issue. *See* 10 C.F.R. § 2.1306. For the reasons set forth below, we conclude that Petitioners have demonstrated standing but have failed to proffer admissible issues. We therefore deny their petitions to intervene and requests for hearing.

of a transfer to Nuclear Management. It would also appear that Northern States filed the Nuclear Management license transfer application to enable Northern States itself to use the latter company's services in the event that the transfer to New NSP is postponed or does not occur.

A. Standing

For a petitioner to demonstrate standing in a Subpart M license transfer proceeding, the petitioner must

- (1) identify an interest in the proceeding by
 - (a) alleging a concrete and particularized injury (actual or threatened) that
 - (b) is fairly traceable to, and may be affected by, the challenged action (the grant of an application), and
 - (c) is likely to be redressed by a favorable decision, and
 - (d) lies arguably within the “zone of interests” protected by the governing statute(s).
- (2) specify the facts pertaining to that interest.

See 10 C.F.R. §§ 2.1306, 2.1308; *Niagara Mohawk Power Corp.* (Nine Mile Point Nuclear Station, Units 1 and 2), CLI-99-30, 50 NRC 333, 340-41 & n.5 (1999) (and cited authority). Moreover, an organization seeking representational standing must demonstrate how at least one of its members may be affected by the licensing action (such as by activities on or near the site), must identify that member by name and address, and must show (preferably by affidavit) that the organization is authorized to request a hearing on behalf of that member. See *GPU Nuclear, Inc.* (Oyster Creek Nuclear Generating Station), CLI-00-6, 51 NRC 193, 202 (2000) (and authority cited therein).

All three Petitioners live, work, or own property in the vicinity of the Prairie Island and Monticello plants. All claim that Northern States’s corporate restructuring leaves unanswered questions about the financial and technical qualifications of the plants’ new operator, and therefore creates a risk of shortcuts in safety that could adversely affect the surrounding area. All seek the same relief to preclude such injury (i.e., denial of approval of the license transfer). And all assert that the safety-related issues fall within the interests protected by the AEA and/or the National Environmental Policy Act.

We recently granted standing in the *Oyster Creek* license transfer proceeding to petitioners who (like those in the instant proceeding) raised similar assertions and either lived or were active quite close to the site. In a license transfer case where (as here) nearby petitioners plausibly claim that underfunding or other deficiencies may result in a general safety risk affecting their persons or property, they should have the opportunity to seek a hearing on their merits arguments. We therefore conclude that the Petitioners in this proceeding have satisfied our standing requirements. See *Oyster Creek*, 51 NRC at 202-03.

B. Admissibility of Issues

To demonstrate that issues are admissible under Subpart M, a petitioner must

- (1) set forth the issues (factual and/or legal) that petitioner seeks to raise,
- (2) demonstrate that those issues fall within the scope of the proceeding,
- (3) demonstrate that those issues are relevant and material to the findings necessary to a grant of the license transfer application,
- (4) show that a genuine dispute exists with the applicant on a material issue of law or fact, and
- (5) provide a concise statement of the alleged facts or expert opinions supporting petitioner's position on such issues, together with references to the sources and documents on which petitioner intends to rely.

See 10 C.F.R. §§ 2.1306, 2.1308; *Nine Mile Point*, CLI-99-30, 50 NRC at 342 (and cited authority). As we stated recently in *Oyster Creek*:

These standards do not allow mere "notice pleading;" the Commission will not accept "the filing of a vague, unparticularized" issue, unsupported by alleged fact or expert opinion and documentary support. General assertions or conclusions will not suffice. This is not to say that our threshold admissibility requirements should be turned into a "fortress to deny intervention." The Commission regularly continues to admit for litigation and hearing issues that are material and are adequately supported.

CLI-00-6, 51 NRC at 203 (citations omitted). For the reasons set forth below, we conclude that Petitioners have raised no admissible issues.⁶

1. Inapplicability of Financial Qualifications Filing Requirements to Nuclear Management (Issues 2, 2a, 3, 4, 4a, 5, 7, 8 (partial), 11, 12, 14, 16, 17, and 22)

a. Transfer of Part 50 License to Nuclear Management (Issues 2, 2a, 3, 4, 4a, 5, 7, 8 (partial), and 17)

Petitioners assert that the Nuclear Management application fails, in various ways, to meet the filing requirements of section 50.33(f) (or section 50.80, which requires compliance with section 50.33) for demonstrating financial qualifications.

⁶ Because the issues raised by Ms. Overland and the Water Office are virtually identical (with the exception of two issues raised by the latter but not the former), we will consider them together. We will use, to the extent possible, the numerical order in Ms. Overland's Petition Regarding the Nuclear Management Application (issues 1-22) and denote the Water Office's two additional issues as 2a and 4a, because they are closely related to Ms. Overland's issues 2 and 4. See Ms. Overland's Petition Regarding the Nuclear Management Application, dated Feb. 27, 2000, at 10-22; Ms. Overland's Petition Regarding the New NSP Application, dated Feb. 27, 2000, at 9-15; Water Office's Petition Regarding the Nuclear Management Application, dated Feb. 29, 2000, at 6-10; Water Office's Petition Regarding the New NSP Application, dated Feb. 29, 2000, at 5-8. Moreover, because these two Petitioners use the same issues to challenge both of the license transfer applications, we will address each issue in the context of both applications.

(These two regulations are reproduced in full in Appendices A and B to this Order, respectively.) In response, Northern States argues that Nuclear Management’s “cost-passthrough” contractual arrangement with Northern States, an electric utility with guaranteed revenues stemming from state-regulated rates, places Nuclear Management under the umbrella of the “electric utility” exception to the financial qualification requirements of section 50.33(f).⁷

We decline to admit Issues 2,⁸ 2a,⁹ 3,¹⁰ 4,¹¹ 4a,¹² 5,¹³ 7,¹⁴ 8 (partial),¹⁵ and 17,¹⁶ insofar as they apply to the Nuclear Management application, though we reach this decision for reasons somewhat different from those proffered by the Applicants. We disagree with them that Nuclear Management falls within the “electric utility” exception and is therefore absolved of any responsibility to show specific financial qualifications. Rather than applying the exception, we find on the current record that Nuclear Management, in effect, has made the necessary showing of financial qualifications because of its cost-passthrough contract with

⁷ See, e.g., Northern States’s Answer to Water Office’s Petition Regarding the Nuclear Management Application, dated March 13, 2000, at 15.

⁸ Issue 2: “The license application poses undue risk to public health and safety because it fails to demonstrate financial qualification of the applicant to carry out the activities for which the permit or license is sought, specifically that the applicant possesses or has reasonable assurance of obtaining the funds necessary to cover estimated operation costs for the period of the license. 10 C.F.R. § 50.33(f)(2).”

⁹ Issue 2a (Water Office’s Issue 3): “The license transfer [to Nuclear Management] poses undue risk to public health and safety because it does not show that the applicant either possesses the necessary funds, or that the applicant has reasonable assurance of obtaining the necessary funds or that by a combination of the two the applicant will have the necessary funds available to cover reactor maintenance expenses that can reasonably be expected to escalate above historical levels as reactor components, including steam generator tubes, deteriorate prematurely and fail at accelerating rates. The potential for these costs to escalate dramatically is amply demonstrated by the record of the NSP v. Westinghouse lawsuit and other lawsuits brought by nuclear utilities against Westinghouse, and by the recent steam tube rupture at Indian Point. 10 C.F.R. [§] 50.33(f)(2).”

¹⁰ Issue 3: “The license application poses undue risk to public health and safety because it fails to provide estimates for total annual operating costs for each of the first five years of operation of the facility. 10 C.F.R. § 50.33(f)(2).”

¹¹ Issue 4: “The license application poses undue risk to public health and safety because it fails to disclose the source of funds to cover the operating costs for the facility. 10 C.F.R. § 50.33(f)(2).”

¹² Issue 4a (Water Office’s Issue 4): “The license transfer [to Nuclear Management] poses undue risk to public health and safety because it fails to disclose any other source of funding, such as the Settlement Agreement between NSP and Westinghouse [E]lectric Corp. that may be necessary to cover reactor maintenance expenses that can reasonably be expected to escalate above historical levels as reactor components, including steam generator tubes, deteriorate prematurely and fail at accelerating rates. As noted above, there is ample record demonstrating the virtual certainty that such costs will escalate dramatically within the next five years. 10 C.F.R. [§] 50.33(f)(2).”

¹³ Issue 5: “The license application poses undue risk to public health and safety because it fails to include the same financial information as is required in an application for an initial license. 10 C.F.R. § 50.33(f)(2).”

¹⁴ Issue 7: “The license application poses undue risk to public health and safety because it fails to disclose its financial ability to meet any contractual obligation to the entity which they have incurred or propose to incur. 10 C.F.R. § 50.33(f)(3)(ii).”

¹⁵ Issue 8 (partial): “The license application poses undue risk to public health and safety because it fails to disclose in sufficient detail the . . . financial . . . qualifications of the proposed transferee as would be required if the application were for an initial license. 10 C.F.R. [§] 50.80.”

¹⁶ Issue 17: “The license transfer application poses undue risk to public health and safety because the applicant, in its proposed Operating License and Technical Specification Pages, relies on the prior financial qualifications of Northern States Power, a corporation that will cease to exist upon completion of the merger, when under federal regulations, it is the applicant, Nuclear Management Company, LLC, which must demonstrate financial qualifications and assurance.”

Northern States, an electric utility with guaranteed rate-backed revenues. This arrangement provides sufficient assurance of Nuclear Management’s financial qualifications. Nothing in Petitioners’ pleadings gives us reason to question, or hold a hearing on, Northern States’s ability to fulfill its contractual commitment. Our conclusion reflects sound regulatory policy and is consistent with both our enabling legislation and our health-and-safety regulations.

Section 182a of the AEA gives the Commission considerable flexibility in determining what kinds of qualifications are needed for particular kinds of licenses. Specifically, that section charges us to review “such of the technical and financial qualifications of the applicant . . . as the Commission may deem appropriate for the license.” 42 U.S.C. § 2232(a). Our financial qualification rule, section 50.33(f), does not expressly address the form of transaction at issue here — where an operating license is split, in effect, between an electric utility “owner” and a nonutility “operator.” But, consistent with congressional intent, the rule contains enough flexibility to allow for an appropriate financial qualification review. Section 50.33(f), in its introductory paragraph, demands only “information sufficient to demonstrate” an applicant’s financial qualifications “to carry out . . . the activities for which the permit or license is sought.” And the same paragraph indicates that the detailed information-filing requirements contained elsewhere in section 50.33(f) (*see* subsections (1), (2), and (3)) come into play only “as applicable.”

Here, after careful review of the Northern States transaction and consideration of all briefs filed in this adjudicatory proceeding, we find the detailed requirements of sections 50.33(f)(2) and (f)(3) not “applicable” to Nuclear Management. Our view is rooted in three factors: (1) the nature of Nuclear Management’s licensed “activities” — i.e., operating the Prairie Island and Monticello plants, not funding them; (2) Northern States’s electric utility status; and (3) Northern States’s contractual commitment to assume full financial responsibility for funding the safe operation, maintenance, and decommissioning of the plants. *See, e.g.*, Nuclear Management Application, Attachment 13 (“Prairie Island Nuclear Power Plant Operating Services Agreement”) at 5, 8, 10, 13, 14, 15-16.

In the context of this case, a detailed examination of Nuclear Management’s costs, resources, and corporate structure, as contemplated by sections 50.33(f)(2) and (f)(3), is unnecessary to meet the objectives of the rule. It is Northern States’s contractual duty, not Nuclear Management’s, to fund safe operation of the Monticello and Prairie Island plants. And Northern States’s ability to pay the costs of running the plants safely has not been called into serious question.¹⁷

¹⁷There may occasionally be unusual situations in which a rate-regulated utility’s financial condition might affect the operator’s ability to obtain sufficient funds to meet its technical health-and-safety responsibilities. *See Gulf*

(Continued)

Because Northern States is an electric utility regulated by the Minnesota Public Utilities Commission, it has reasonable assurance of receiving sufficient rate revenue to fund the safe operation of its plants. Indeed, our regulations presume that rate-regulated utilities like Northern States are financially qualified to own or operate nuclear power plants, and therefore expressly exempt them from a further financial qualification showing. *See* 10 C.F.R. § 50.33(f) (“electric utility” exception).¹⁸

It is true, of course, as Petitioners stress, that the proposed licensed plant operator, Nuclear Management, is not itself an electric utility, but the combination of the state regulator’s revenue guarantee to Northern States *and* Northern States’s own service agreement with Nuclear Management providing for cost passthrough offers reasonable assurance as to the payment of Nuclear Management’s costs, and allows us to find in the current record “information sufficient to demonstrate [Nuclear Management’s] financial qualification . . . to carry out the activities for which the license . . . is sought.” 10 C.F.R. § 50.33(f). Even the bankruptcy of Nuclear Management presumably would not endanger the public health and safety, for Northern States would remain both obliged and able to fund the plants’ continued safe operation (or safe shutdown). For these reasons, we find Nuclear Management financially qualified based on the current record, see no reason for further hearing on Petitioners’ financial contentions, and conclude that the financial aspects of transferring the plants’ operating licenses to Nuclear Management will not place in jeopardy the public health and safety.

We acknowledge that Petitioners arguably have not had a full opportunity to address the *precise* theory on which we rest today’s finding that Nuclear Management is financially qualified. Thus, we grant Petitioners permission to file a consolidated request for reconsideration within 10 business days of the date of this order. *Cf.* 10 C.F.R. §§ 2.771, 2.786(e). *See generally Louisiana Energy Services, L.P.* (Claiborne Enrichment Center), CLI-96-8, 44 NRC 107, 110 n.2 (1996). Northern States may file a response within 10 business days of receiving from Petitioners any such request.

States Utilities Co. (River Bend Station, Unit 1), CLI-94-10, 40 NRC 43 (1994). In *River Bend*, we permitted a hearing because the intervenors had raised plausible concerns that the plant owner, although an electric utility, was under such financial pressure that it would not reliably pass through its rate-backed revenues to fund safe operation of the plant. Petitioners here have raised no such concerns, although, as we explain below, we will give Petitioners an additional opportunity to do so.

¹⁸ *See* Final Rule, “Elimination of Review of Financial Qualifications of Electric Utilities in Operating License Review and Hearings for Nuclear Power Plants,” 49 Fed. Reg. 35,747, 35,749 (“the rate process . . . assure[s] that regulated utilities will have the financial resources needed to operate safely”) (Sept. 12, 1984).

b. *Transfer of Part 72 ISFSI License to Nuclear Management (Issues 11-12, 14, and 22)*

In *Issues 11-12*, Petitioners assert that the license transfer poses undue risk to public health and safety because it does not show that the Applicant either will have the necessary funds (either by possessing funds or by having a reasonable assurance of obtaining funds) available to cover estimated operating costs over the planned life of the ISFSI, and that the applicant will have the necessary funds to cover estimated decommissioning costs after the removal of spent fuel from storage. 10 C.F.R. § 72.22(e)(2), (3).

We conclude, for the same reasons set forth in the preceding section, that Nuclear Management has demonstrated the necessary financial qualifications to operate the ISFSI by providing assurances that Northern States will continue to pay the operation and maintenance expenses for the ISFSI. Because Northern States's own status as an electric utility remains unchanged, there will be no change in the financial qualifications of the party ultimately responsible for the safe operation, maintenance, and decommissioning of the ISFSI. Moreover, Northern States has committed in its Nuclear Power Plant Operating Services Agreement with Nuclear Management to continue financing the decommissioning trust funds, and as an electric utility it retains its rate-based ability to finance those funds. We therefore decline to admit this issue.¹⁹

Petitioners in *Issue 22* argue that “[t]he license transfer application poses undue risk to public health and safety because[,] . . . although it does include a contract between Northern States Power Company and Nuclear Management Company, L.L.C., for the generating plants, the Prairie Island contract only mentions that [Northern States] operates an ISFSI, but . . . does not specifically include provisions for operations, maintenance, decommissioning and nuclear waste storage at the Prairie Island ISFSI.” (This issue is not included in the Petition Regarding the New NSP Application.)

Petitioners' position reflects a misreading of the Nuclear Power Plant Operating Services Agreement for the Prairie Island site. Under the terms of that agreement, Northern States agrees to pay the operating, decommissioning, and capital improvement costs for “the plant” — a term the Agreement defines to include “a nuclear power plant and independent spent fuel storage installation near Red Wing, Minnesota.” See Prairie Island Agreement at 1, 2, 10, appended to Nuclear Management Application as “Attachment 13.” We therefore reject this issue.

¹⁹ Petitioners proffer a similar argument denominated as *Issue 14*: “The license transfer poses undue risk to public health and safety because the applicant has not provided financial assurance for decommissioning the ISFSI as if it were an initial application. 10 C.F.R. § 72.30.” We conclude (for the same reasons as set forth above regarding Issues 11 and 12) that the application meets our regulatory requirements. We therefore decline to admit this issue.

c. Transfer of Both Part 50 and Part 72 Licenses to Nuclear Management (Issue 16)

In *Issue 16*, Petitioners argue (in part) that “[t]he license transfer poses undue risk to public health and safety because the applicant has not provided documentation that ‘Nuclear Management Company, LLC’ has any independent assets. . . .” Northern States responds that Nuclear Management will have assets in the form of cost-reimbursement payments it will receive from Northern States and the personnel it will inherit from Northern States or have at its headquarters. *See Answer to Ms. Overland’s Petition Regarding the Nuclear Management Application at 29-30.* We decline to admit this issue on the same grounds specified earlier in this Order.

2. Inapplicability of “Electric Utility” Exception to New NSP (Issues 2-7, 11-12, and 16)

a. Transfer of Part 50 License to New NSP (Issues 2-7 and 16)

Northern States in the New NSP application explains that the latter company will be an electric utility and is therefore not required to provide the information specified in section 50.33(f)(2). *See Northern States’s Answer Regarding Ms. Overland’s Petition Regarding the Nuclear Management Application at 11-14.* Northern States relies on our definition of “electric utility” in 10 C.F.R. § 50.2, i.e., an entity that will distribute electricity and recover its costs through regulatorily-established rates.²⁰ It then claims that New NSP’s status as an “electric utility” will exempt it from the financial qualifications requirements of 10 C.F.R. § 50.33(f), which provides that “[e]ach applicant shall state: . . . [e]xcept for an electric utility applicant . . . , information sufficient to demonstrate . . . the financial qualification of the applicant. . . .”

Petitioners assert that New NSP must comply with the financial qualifications filing requirements of 10 C.F.R. § 50.33(f). *See, e.g., Ms. Overland’s Petition Regarding the New NSP Application at 10-11.* We disagree. The rationale for the electric utility exception is equally applicable to future utilities as it is to existing ones — i.e., the ratemaking process (federal and/or state) provides reasonable assurance that the utilities will have access to the funds necessary to operate their facilities safely. Moreover, the fact that New NSP is a “newly formed entity” is beside the point. Although section 50.33(f)(3) imposes certain additional financial-information requirements on “newly formed entities,” these requirements are

²⁰The Stipulation and Agreement between Northern States and the Minnesota Attorney General (and filed with the Minnesota Public Utilities Commission) provides that “all certificates of need, franchises, *rate schedules*, and other authorities provided or issued by operation of law or by order of the [Minnesota Public Utilities Commission] to [Northern States], *be deemed to be held by New NSP . . . effective upon the merger’s closing.*” *See Ms. Overland’s two petitions, Exhibit A at 1 (emphasis added).*

subject to the same electric-utility exception cited above. Consequently, those additional requirements do not apply to New NSP. We therefore decline to admit their issues 2-7 and 16²¹ insofar as they apply to New NSP's proposed ownership of the Prairie Island and Monticello facilities.

b. Transfer of Part 72 ISFSI License to New NSP (Issues 11, 12, 14, and 16)

We draw a similar conclusion regarding the transfer of ISFSI ownership, though for a somewhat different reason. Section 72.22(e) of our regulations sets forth the financial qualifications requirements for the owner or operator of an ISFSI. Unlike section 50.33(f), it neither specifies particular information-filing requirements nor includes an explicit "electric utility" exception. Petitioners have not explained, even in cursory terms, why state-regulated rates are insufficient to enable New NSP to meet its operating and decommissioning cost obligations. *See, e.g.,* Ms. Overland's Petition Regarding the New NSP Application at 11-12, 13 (Issues 11, 12, 14, 16). For this reason, we decline to admit those issues insofar as they apply to New NSP's proposed ownership of the ISFSI.²²

²¹ *Issue 2:* "The license application poses undue risk to public health and safety because it fails to demonstrate financial qualification of the applicant to carry out the activities for which the permit or license is sought, specifically that the applicant possesses or has reasonable assurance of obtaining the funds necessary to cover estimated operation costs for the period of the license. 10 C.F.R. § 50.33(f)(2)."

Issue 3: "The license application poses undue risk to public health and safety because it fails to provide estimates for total annual operating costs for each of the first five years of operation of the facility. 10 C.F.R. § 50.33(f)(2)."

Issue 4: "The license application poses undue risk to public health and safety because it fails to disclose the source of funds to cover the operating costs for the facility. 10 C.F.R. § 50.33(f)(2)."

Issue 5: "The license application poses undue risk to public health and safety because it fails to include the same financial information as is required in an application for an initial license. 10 C.F.R. § 50.33(f)(2)."

Issue 6: "The license application poses undue risk to public health and safety because it fails to disclose the legal and financial relationships it has or proposes to have with its stockholders or owners. 10 C.F.R. § 50.33(f)(3)(i)."

Issue 7: "The license application poses undue risk to public health and safety because it fails to disclose its financial ability to meet any contractual obligation to the entity which they have incurred or propose to incur. 10 C.F.R. § 50.33(f)(3)(ii)."

Issue 16: "The license transfer poses undue risk to public health and safety because the applicant has not provided documentation that New NSP has any independent assets nor has it demonstrated that [New NSP] is anything more than a shell corporation to which operating expenses will be transferred as needed by the parent corporation."

²² *Issues 11 and 12:* The license transfer poses undue risk to public health and safety because it does not show that the applicant either possesses the necessary funds, or that the applicant has reasonable assurance of obtaining the necessary funds or that by a combination of the two the applicant will have the necessary funds available to cover estimated operating costs over the planned life of the ISFSI, and that the applicant will have the necessary funds available to cover estimated decommissioning costs and the necessary financial arrangements to provide reasonable assurance prior to transfer of the license that decommissioning will be carried out after the removal of spent fuel from storage. 10 C.F.R. § 72.22(e)(2), (3).

Issue 14: "The license transfer poses undue risk to public health and safety because the applicant has not provided financial assurance for decommissioning the ISFSI as if it were an initial application. 10 C.F.R. § 72.30." We reject this issue on the same grounds as we rejected analogous Issues 11 and 12.

Issue 16: "The license transfer poses undue risk to public health and safety because the applicant has not provided documentation that New NSP has any independent assets nor has it demonstrated that [New NSP] is anything more than a shell corporation to which operating expenses will be transferred as needed by the parent corporation."

3. Reactor License Transfer Requirements Pursuant to Sections 50.80 and 50.90 (Issues 8-10, 13, and 18)

Issues 8 and 9: “The license application poses undue risk to public health and safety because it fails to disclose in sufficient detail the identity, financial and technical qualifications of the proposed transferee as would be required if the application were for an initial license. 10 C.F.R. Part 34; 10 C.F.R. § 50.80.”

We reject these issues insofar as they challenge either application. Petitioners do not explain what “sufficient detail[s]” are lacking with regard to the identity of either New NSP or Nuclear Management. We find no such details to be missing. *See* New NSP Application at A1-A4; Nuclear Management Application at 1, 3. Moreover, as explained *supra*, New NSP is not required to meet the *financial* qualification requirements of section 50.33(f) and, as discussed previously, Nuclear Management has also satisfied those requirements. Petitioners also fail to explain why the license transfers would have any effect on the *technical* qualifications of either New NSP or Nuclear Management. Mere conclusions or assertions do not suffice to establish admissible issues under Subpart M. *See Oyster Creek*, 51 NRC at 203. Here, Nuclear Management (which we understand will eventually be the facilities’ operator) expects to employ substantially the same personnel and use essentially the same onsite organizations as are now employed and used by Northern States. Consequently, we see no grounds on which to question either New NSP’s or Nuclear Management’s technical qualifications, and we decline to admit the issue.

Issue 13: “The license transfer poses undue risk to public health and safety because the applicant has not provided the applicant’s technical qualifications to engage in operating the ISFSI as if it were an initial application. 10 C.F.R. § 72.28.” We reject Issue 13 on the same ground as we rejected analogous Issues 8 and 9, above, regarding technical qualifications to operate the nuclear reactors.

Issue 18: “The license transfer application poses undue risk to public health and safety because the applicant, in its proposed Operating License and Technical Specification Pages, relies on the technical qualifications of Northern States Power, but the applicant, Nuclear Management Company, LLC, must demonstrate technical qualifications. [Nuclear Management] Application, Exhibits 3-11.” (This argument is also Issue 21 of Ms. Overland’s Petition Regarding the New NSP Application, citing Exhibits F, G, H.) To the extent this issue is intended to address the New NSP application, we reject it on the ground that it refers only to Nuclear Management. In the context of the Nuclear Management application, we reject this issue on the same ground that we rejected analogous Issues 8 and 9 regarding technical qualifications to operate the nuclear reactors and Issue 13 regarding technical qualifications to operate the ISFSI.

Issue 10: “The license amendment requested by applicant poses undue risk to public health and safety because it does not follow the form and does not provide

the information prescribed for original applications. 10 C.F.R. [§] 50.90.’’ We do not believe that the two applications are flawed in this respect. Section 50.90 provides, in relevant part, that the licensee ‘‘follow[] as far as applicable, the form prescribed for the original applications.’’ The inclusion of the phrase ‘‘as far as applicable’’ makes clear that we do not require applicants to follow slavishly the form for original applications. In any event, Petitioners have not satisfied their obligation to explain what parts of ‘‘the form . . . or information’’ for original applications Northern States improperly failed to include in its two license transfer applications.

4. Corporate-Related Issues (Issues 1, 6, 15, 16, 17, 18, and 23)

Issue 1: ‘‘The license application poses undue risk to public health and safety because it fails to disclose the names and addresses of corporate officers, and the application is premature as the applicant is in fact *unable* to make this disclosure, stating in the application that the names of the officers are not known. 10 C.F.R. § 50.33(d)(3)(ii); 10 C.F.R. § 72.22(d)(3)(ii).’’ Regarding the New NSP application, Petitioners go on to state that New NSP ‘‘does not exist to make the application as proposed licensee.’’

We reject this issue on the ground that Northern States has provided the information for both New NSP (*see* Northern States’s Answer to Ms. Overland’s Petition Regarding the New NSP Application at 10; ‘‘Supplement 1 to Request for Transfer of NRC Licenses and Application for License Amendments Dated October 29, 1999,’’ dated March 14, 2000) and Nuclear Management (*see* Northern States’s Answer to Ms. Overland’s Petition Regarding the Nuclear Management Application at 11; Application Regarding Nuclear Management at 5-7).

Issue 6: ‘‘The license application poses undue risk to public health and safety because it fails to disclose the legal and financial relationships it has or proposes to have with its stockholders or owners. 10 C.F.R. § 50.33(f)(3)(i).’’

As we held earlier in this Order, we deem Nuclear Management financially qualified on the current record and find the detailed financial reporting requirements of section 50.33(f)(3) not applicable. There is, in any event, no apparent issue here. Northern States’s application clearly discloses the legal and financial relationship that Nuclear Management will have with the stockholders and owners upon which it will rely for funds to operate the four facilities. Specifically, Northern States points to the application’s identification of Nuclear Management’s owners, explanation of the relationship between one such owner and Northern States, and further explanation of the relationship between Nuclear Management and Northern States. *See* Application at 1-3; Northern States’s Answer to Ms. Overland’s Petition Regarding the Nuclear Management Application at 17-18. Neither Ms. Overland’s nor the Water Office’s Reply

addresses this information. We find Northern States’s Answer convincing and, accordingly, do not admit this issue.

Issue 15: Petitioners offer slightly different variations of this issue as it pertains to each of the two applications.

Petitioners proffer the following issue regarding the Nuclear Management Application:

The license transfer poses undue risk to public health and safety because the applicant proposes that Nuclear Management Company, LLC, operate the Monticello and Prairie Island nuclear generating plants and ISFSI, together with several other plants owned by Wisconsin Electric Power Company, Alliant Energy Corporation, and Wisconsin Public Service Corporation; that the corporate structure of that transfer includes yet another layer of corporations, named NSP Nuclear Corporation, Alliant Energy Nuclear, LLC, WEC Nuclear Corporation, and WPS Nuclear Corporation, which further legally insulates the parent corporations from liability for Nuclear Management Company, LLC, and nuclear operations generally.

We recently rejected a similar “limited liability” argument in *Oyster Creek*. CLI-00-6, 51 NRC at 208. In that proceeding, an intervenor had asserted “that a limited liability company is ‘inherently unqualified to own and operate’ a nuclear power plant.” We disagreed, ruling that limited liability companies are no different from corporations in that both are legally structured to limit the liability of their shareholders, and that the Commission has issued reactor licenses to such limited liability organizations for decades. We find the reasoning in that decision dispositive of this issue.²³

Petitioners present a more broadly worded Issue 15 in their challenge to the New NSP Application:

The license transfer poses undue risk to public health and safety because the applicant repeatedly states that “New NSP” will be operating the plants and ISFSI, despite NSP’s application of November 24, 1999, that demonstrates otherwise — that the plants and ISFSI, together with several other plants owned by Wisconsin Electric Power Company, Alliant Energy Corporation, and Wisconsin Public Service Corporation, will be operated by “Nuclear Management Company, LLC,” another newly formed entity, and that the corporate structure of that transfer includes another layer of corporations, named NSP Nuclear Corporation, Alliant Energy Nuclear, LLC, WEC Nuclear Corporation, and WPS Nuclear Corporation, further insulating the parent corporations from liability for Nuclear Management Company, LLC and nuclear operations generally.

It seems that Petitioners are here proffering two separate arguments. Insofar as Petitioners are challenging the limited liability of the New NSP, we reject it

²³ Petitioners proffer a similar argument denominated *Issue 16*: “The license transfer poses undue risk to public health and safety because the applicant has not . . . demonstrated that [Nuclear Management Company] is anything more than a shell corporation to which operating expenses will be transferred as desired by the generating plant and/or ISFSI owner.” We reject this issue on the same grounds as we decline to admit Issue 15.

on the ground stated immediately above. To the extent that they are also arguing that the New NSP application is inconsistent with the Nuclear Management application regarding which of those entities will have operating authority, we find Petitioners' literal reading to be accurate, but suggestive of nothing more than the complexity of the restructuring that underlies the proposed license transfers.

Corporations such as Northern States often structure their mergers and acquisitions in a way that provides them alternative means of accomplishing their goals. We view the current dual applications as merely a reflection of this fact. As we read the applications and their supporting documents, they indicate to us that Northern States wants to have the option of either passing along the operating authority to New NSP (which would presumably later pass the authority along to Nuclear Management after receiving the Commission's approval of an as-yet-unfiled license transfer application), or to transfer that same authority directly to Nuclear Management. This is consistent with our understanding that Northern States intends to take the first of these options, i.e., it will act first on the New NSP transfer (by shifting its assets and licenses to that company) and only later will New NSP seek to transfer the operating authority to Nuclear Management. When viewed in this light, the apparent contradiction between the provisions of the two applications vanishes. New NSP would need operating authority during the interim period between the facilities' operation by the current Northern States and the Commission's action on an application for a transfer of operating authority to Nuclear Management. *See* note 5, *supra*. For these reasons, we decline to admit Issue 15 as it applies to New NSP.

Petitioners also raise a similar argument in what we denominate *Issue 23*:²⁴

Applicant repeatedly states both that NSP will "continue" to exist as a legal entity and that after the merger, a [newly formed, wholly owned utility operating company subsidiary, "New NSP" shall be formed. Both are not possible. Under the merger, NSP and [New Century Energy] will merge and become "Xcel," and "Old NSP" will cease to exist. A "New NSP" will be formed, and this "New NSP" is, as applicant admits, a *NEW* legal entity. As such, a *new* entity cannot "*continue*" anything, it will *begin*. The repeated conflation and statements that the new entity will "continue" does [*sic*] not belie the fact that the "New NSP" is admittedly a newly formed entity and as such, "New NSP" must provide financial assurance as required for any other new entity. Application at A-2, A-3, A-4, A-7. Exhibit H (Information Notice 89-25).

(Emphasis in original petition.) Again, we find Petitioners' literal reading to be inconsequential. New NSP will be an electric utility and will therefore be exempt

²⁴This issue is enumerated as Issue 19 of Ms. Overland's Petition Regarding the New NSP Application, but is not included in her Petition Regarding the Nuclear Management Application.

from the financial assurance requirements to which Petitioners allude, i.e., 10 C.F.R. § 50.33(f)(3) (regarding new entities).²⁵

Issue 17: “The license transfer application poses undue risk to public health and safety because the applicant, in its proposed Operating License and Technical Specification Pages, relies on the prior financial qualifications of Northern States Power, a corporation that will cease to exist upon completion of the merger, when under federal regulations, it is the applicant, Nuclear Management Company, LLC, which must demonstrate financial qualifications and assurance. [Nuclear Management] Application, Exhibits 3-11.”²⁶ We have already excluded this issue as it relates to the Nuclear Management application. Given that Nuclear Management is the sole focus of this issue, we also reject it as irrelevant to the New NSP application.

5. NEPA Issues (Issues 19-20)

Issue 19: “The license transfer application violates NEPA because it does not adequately address financial qualifications and assurance and the potential impact of corporate failure, multi-layered limited liability, and abdication of financial responsibility on the surrounding community’s tax base, property values, and electric rates.” (This argument is also Issue 17 of Ms. Overland’s Petition Regarding the New NSP Application.)

Issue 20: “The license transfer application violates NEPA [the National Environmental Policy Act] because it does not adequately address technical qualifications of the applicant to operate, decommission, and handle the nuclear waste without posing undue risk to public health and safety.” (This argument is also Issue 18 of Ms. Overland’s Petition Regarding the New NSP Application.)

We reject these two issues because the Commission has made a generic determination that license transfers will not have a significant effect on the environment (*see* 10 C.F.R. § 51.22(c)(21)) and Petitioners have given us no reason to determine otherwise in this proceeding. Consequently, NEPA issues are not germane to the proceeding.

6. Price-Anderson Issue (Issue 21)

Issue 21: “The license transfer application poses undue risk to public health and safety because it is proposed that only NSP, which will cease to exist upon

²⁵ In addition, Northern States will not cease to exist upon the completion of the merger; rather, it will simply do business under a new name. It is our understanding of the merger that Northern States is purchasing New Century Energy, that Northern States will be the surviving entity, and that it will thereafter change its name to Xcel.

²⁶ This argument is also included as Issue 20 of Ms. Overland’s Petition Regarding the New NSP Application, citing Application, Exhibits F, G, H.

completion of the merger, have and maintain financial protection under Section 170 of the Atomic Energy Act of 1954 [referring to the Price-Anderson Act] to cover public liability claims. ‘Nuclear Management Company, LLC,’ as the licensed operator, must provide this coverage as well. ‘New NSP’ and ‘NSP Nuclear Corporation,’ as the owners, must provide this coverage as well, and must maintain coverage to address liability responsibility for financial assurance purposes.’ (This argument is Issue 22 in the Petition Regarding the New NSP Application, where Petitioner similarly asserts that “ ‘New NSP,’ as the licensee, must provide this coverage as well, and must maintain coverage to address liability responsibility for financial assurance purposes.’”)

The four nonadjudicatory orders that the Staff issued earlier in this proceeding render moot this issue insofar as it pertains to New NSP and Nuclear Management. Those Staff orders require that Nuclear Management and New NSP each be added to the indemnity agreement and the nuclear liability insurance policies, and also that they participate in the secondary retrospective insurance pool.²⁷ Insofar as Petitioners’ argument addresses the responsibilities of NSP Nuclear Corporation (not a participant in this proceeding), Petitioners ignore the fact that 10 C.F.R. §§ 140.1, 140.2(a), 140.10, and 140.11(a) call only for “licensees” to maintain financial protection — a group within which NSP Nuclear Corporation does not and presumably will not fall.

7. *General Issues Proffered by the Indian Community*

The Indian Community raises two general issues. First, it argues that Northern States has failed to demonstrate the qualifications of Nuclear Management to hold the operating license for the Prairie Island plants and ISFSI. More specifically, the Indian Community does not share Northern States’s view that the application and license changes are of merely an “administrative” nature, nor does it share Northern States’s “expectation” that current plant and ISFSI personnel will transfer essentially intact to Nuclear Management. The Indian Community sees nothing in the application that would demonstrate either the technical or the personnel qualifications of Nuclear Management — a company that, according to the Indian Community, has no history, virtually no employees, and no performance record. Similarly, the Indian Community sees in the application no showing of

²⁷ See Staff Orders Concerning Transfer of Monticello Operating Authority to Nuclear Management at 4 (Condition 2) (May 15, 2000); Staff Orders Concerning Transfer of Prairie Island Operating Authority to Nuclear Management at 4 (Condition 2) (May 15, 2000); Staff Order Concerning Transfer of Monticello Ownership to New NSP at 3 (Condition 1) (May 12, 2000); Staff Order Concerning Transfer of Prairie Island Ownership to New NSP at 4 (Condition 1) (May 12, 2000). See also each of the Safety Evaluations, ¶4.0, appended to each of these four Staff orders. Moreover, Petitioners’ argument ignores New NSP’s obligation and commitment to maintain the financial protection required by the Price-Anderson Act. See New NSP Application at A-7; Northern States’s Answer to Ms. Overland’s Petition Regarding the New NSP Application at 28. See also Northern States’s Answer to Ms. Overland’s Petition Regarding the Nuclear Management Application at 34 & n.17.

Nuclear Management's financial viability, especially as the company has no apparent assets. The Indian Community is also concerned about Northern States's proposal to separate the operational responsibility (which would reside with Nuclear Management) from the financial responsibility (which would remain with Northern States). *See* Indian Community's Petition to Intervene, dated March 6, 2000, at 4-5.

Second, the Indian Community contends that Northern States has failed to provide as much information on Nuclear Management as would be required of an initial applicant and has thereby failed to show that its license transfer request is otherwise consistent with law. Regarding this second issue, the Indian Community asserts that Northern States is using the separation of financial and operational responsibilities to avoid the provisions of 10 C.F.R. §§ 50.80 and 72.50 requiring Applicants to provide "as much of the information . . . with respect to the identity and technical and financial qualifications of the proposed transferee as would be required . . . if the application were for an initial license." According to the Community, this absence of information exposes it to "the dangers of failures to perform by [Nuclear Management]." *See id.* at 5-6.

The Commission has addressed each facet of these two general issues in its discussion of the issues raised by Ms. Overland and the Water Office. We reject these general issues on the same grounds as we rejected the more specific issues proffered by Ms. Overland and the Water Office.

C. Request for Consolidation

Ms. Overland requests that these two license transfer applications be consolidated with similar applications seeking to transfer operating authority of other nuclear facilities (e.g., Point Beach, Kewaunee, Duane Arnold) to Nuclear Management. *See* Ms. Overland's Reply, dated March 15, 2000, at 17; Ms. Overland's Petition Regarding the Nuclear Management Application at 2 n.1. Our rejection of the three hearing requests in this proceeding renders Ms. Overland's request moot. In any event, there are no pending adjudications regarding the other facilities, so there would be no adjudicatory proceedings into which the instant one could be consolidated.

II. CONCLUSION

For the reasons set forth above, the Commission:

- (1) Denies the petitions to intervene and requests for hearing filed by Ms. Overland, the Water Office, and the Indian Community;
- (2) Dismisses as moot Ms. Overland's request for consolidation;
- (3) Authorizes Petitioners to file a consolidated request for reconsideration

within 10 business days of the date of this Order, and further authorizes Northern States to file a response within 10 business days of receiving Petitioners' request.
IT IS SO ORDERED.

For the Commission²⁸

ANNETTE L. VIETTI-COOK
Secretary of the Commission

Dated at Rockville, Maryland,
this 1st day of August 2000.

²⁸Chairman Meserve and Commissioner Diaz were not available for affirmation of this Memorandum and Order. Had they been present, they would have affirmed the Memorandum and Order.

APPENDIX A

10 C.F.R. § 50.33: Contents of applications; general information.

Each application shall state:

* * * *

(f) Except for an electric utility applicant for a license to operate a utilization facility of the type described in § 50.21(b) or § 50.22, information sufficient to demonstrate to the Commission the financial qualification of the applicant to carry out, in accordance with regulations in this chapter, the activities for which the permit or license is sought. As applicable, the following should be provided:

(1) If the application is for a construction permit, the applicant shall submit information that demonstrates that the applicant possesses or has reasonable assurance of obtaining the funds necessary to cover estimated construction costs and related fuel cycle costs. The applicant shall submit estimates of the total construction costs of the facility and related fuel cycle costs, and shall indicate the source(s) of funds to cover these costs.

(2) If the application is for an operating license, the applicant shall submit information that demonstrates the applicant possesses or has reasonable assurance of obtaining the funds necessary to cover estimated operation costs for the period of the license. The applicant shall submit estimates for total annual operating costs for each of the first five years of operation of the facility. The applicant shall also indicate the source(s) of funds to cover these costs. An application to renew or extend the term of an operating license must include the same financial information as is required in an application for an initial license.

(3) Each application for a construction permit or an operating license submitted by a newly-formed entity organized for the primary purpose of constructing or operating a facility must also include information showing:

(i) The legal and financial relationships it has or proposes to have with its stockholders or owners;

(ii) Its financial ability to meet any contractual obligation to the entity which they have incurred or proposed to incur; and

(iii) Any other information considered necessary by the Commission to enable it to determine the applicant's financial qualification.

(4) The Commission may request an established entity or newly-formed entity to submit additional or more detailed information respecting its financial arrangements and status of funds if the Commission considers this information appropriate. This may include information regarding a licensee's ability to continue the conduct of the activities authorized by the license and to decommission the facility.

APPENDIX B

10 C.F.R. § 50.80: Transfer of licenses.

(a) No license for a production or utilization facility, or any right thereunder, shall be transferred, assigned, or in any manner disposed of, either voluntarily or involuntarily, directly or indirectly, through transfer of control of the license to any person, unless the Commission shall give its consent in writing.

(b) An application for transfer of a license shall include as much of the information described in §§ 50.33 and 50.34 of this part with respect to the identity and technical and financial qualifications of the proposed transferee as would be required by those sections if the application were for an initial license, and, if the license to be issued is a class 103 license, the information required by § 50.33a. The Commission may require additional information such as data respecting proposed safeguards against hazards from radioactive materials and the applicant's qualifications to protect against such hazards. The application shall include also a statement of the purposes for which the transfer of the license is requested, the nature of the transaction necessitating or making desirable the transfer of the license, and an agreement to limit access to Restricted Data pursuant to § 50.37. The Commission may require any person who submits an application for license pursuant to the provisions of this section to file a written consent from the existing licensee or a certified copy of an order or judgment of a court of competent jurisdiction attesting to the person's right (subject to the licensing requirements of the Act and these regulations) to possession of the facility involved.

(c) After appropriate notice to interested persons, including the existing licensee, and observance of such procedures as may be required by the Act or regulations or orders of the Commission, the Commission will approve an application for the transfer of a license, if the Commission determines:

- (1) That the proposed transferee is qualified to be the holder of the license; and
- (2) That transfer of the license is otherwise consistent with applicable provisions of law, regulations, and orders issued by the Commission pursuant thereto.

UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

COMMISSIONERS:

Richard A. Meserve, Chairman
Greta Joy Dicus
Nils J. Diaz
Edward McGaffigan, Jr.
Jeffrey S. Merrifield

In the Matter of

Docket No. 40-8968-ML

HYDRO RESOURCES, INC.
(2929 Coors Road, Suite 101,
Albuquerque, NM 87120)

August 21, 2000

The Commission refuses to reconsider its prior ruling leaving a materials license in place, but prohibiting its use, pending submission of sufficient financial assurance information. CLI-00-8, 51 NRC 227 (2000). The Commission finds that its approach does not prejudice Intervenors.

MATERIALS LICENSE: FINANCIAL ASSURANCE

RULES OF PRACTICE: OPPORTUNITY FOR HEARING

Subpart L's authorization of post-licensing hearings carries with it a Commission obligation to set aside wrongfully issued licenses when the hearing process uncovers fatal defects.

MATERIALS LICENSE: FINANCIAL ASSURANCE

RULES OF PRACTICE: OPPORTUNITY FOR HEARING

Some licensing defects, such as a failure to provide sufficient information, by their nature do not call for revoking a license outright, for a prompt cure may be

possible without compromising the public health and safety and without defeating Intervenor's hearing rights.

MEMORANDUM AND ORDER

On May 25, 2000, we issued an order in this docket prohibiting Hydro Resources, Inc. (HRI), from using its already-issued license for *in situ* leach mining operations at the so-called "Crownpoint Uranium Project" in New Mexico. *See* CLI-00-8, 51 NRC 227 (2000). We reasoned that HRI had failed to submit sufficient financial assurance information, or to obtain the requisite NRC Staff approval of a financial assurance plan, even for the one site, "Church Rock, Section 8," where HRI had plans to begin operations in the foreseeable future. *See id.* at 239-43. We gave HRI 180 days to submit a financial assurance plan, and provided Intervenor's an opportunity to litigate the adequacy of the proposed plan. *See id.* at 242. In the meantime, as a matter of our "equitable discretion to fashion sensible remedies," we left the HRI license in force but added a condition prohibiting use of the license until HRI supplied the missing financial assurance information and obtained NRC Staff approval of a financial assurance plan. *See id.* at 241-42 & n.18.

Intervenor's have moved for partial reconsideration of our Order. They maintain that we should have revoked HRI's license rather than simply prohibited its use. We disagree. The hearing process in this case has largely taken place after NRC Staff issuance of the HRI license, as permitted by our procedural rules governing materials licensing. *See* 10 C.F.R. Part 2, Subpart L. Intervenor's correctly point out that Subpart L's authorization of post-licensing hearings carries with it a Commission obligation to set aside wrongfully issued licenses when the hearing process uncovers fatal defects. Some licensing defects, however, such as a failure to provide sufficient information, by their nature do not call for revoking a license outright, for a prompt *cure* may be possible without compromising the public health and safety and without defeating Intervenor's hearing rights.

That is the case here. We have required HRI to submit a financial assurance plan. In the meantime, HRI cannot use its license. Our approach does not prejudice Intervenor's, as we have guaranteed their right to challenge HRI's ultimate financial assurance showing, and the Presiding Officer, and ultimately the Commission itself, stand ready to reject HRI's license should HRI's showing prove inadequate.

The motion for partial reconsideration is denied.

IT IS SO ORDERED.

For the Commission¹

ANNETTE L. VIETTI-COOK
Secretary of the Commission

Dated at Rockville, Maryland,
this 21st day of August 2000.

¹Commissioner Dicus was not available for affirmation of this Memorandum and Order. Had she been present, she would have affirmed the Memorandum and Order.

UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

COMMISSIONERS:

Richard A. Meserve, Chairman
Greta J. Dicus
Nils J. Diaz
Edward McGaffigan, Jr.
Jeffrey Merrifield

In the Matter of

Docket No. 11004440
(License No. XSNM 02611)

TRANSNUCLEAR, INC.
(Export of 93.3% Enriched Uranium)

August 24, 2000

The Commission denies the Nuclear Control Institute's amended petition to intervene and request a hearing on Transnuclear, Inc.'s revised license application seeking to export highly enriched uranium to The Netherlands. The Commission also orders issuance of the export license.

EXPORT LICENSING PROCEEDING: STANDING TO INTERVENE

An organization's institutional interest in providing information to the public and the generalized interest of its membership in minimizing the danger from proliferation are insufficient to confer standing under section 189a of the Atomic Energy Act of 1954, as amended. *Transnuclear, Inc.* (Export of 93.3% Enriched Uranium), CLI-99-15, 49 NRC 366, 367-68 (1999); *Transnuclear, Inc.* (Export of 93.3% Enriched Uranium), CLI-98-10, 47 NRC 333, 336 (1998); *Transnuclear, Inc.* (Export of 93.15% Enriched Uranium), CLI-94-1, 39 NRC 1, 4-6 (1994).

EXPORT LICENSING PROCEEDING: STANDING TO INTERVENE
(DISCRETIONARY STANDING)

A discretionary hearing is not warranted where such a hearing would impose unnecessary burdens on participants and would not provide the Commission with

additional information needed to make its statutory determinations under the AEA. 10 C.F.R § 110.84(a).

ATOMIC ENERGY ACT: HEU EXPORT LICENSE

Diplomatic notes containing a government's assurances that it will convert HEU fuel to LEU fuel as soon as the conversion has been licensed by appropriate regulatory authorities and a supply of LEU fuel becomes available, constitute assurances sufficient to satisfy AEA section 134a(2). *Transnuclear, Inc.* (Export of 93.3% Enriched Uranium), CLI-99-20, 49 NRC 469, 473-74 (1999), *citing id.*, CLI-98-10, 47 NRC at 338 n.5.

ATOMIC ENERGY ACT: HEU EXPORT LICENSE

Analysis performed by Argonne National Laboratories of a facility's fuel needs is sufficient evidence upon which the NRC may rely in assessing the potential risk of retransfer of excess HEU.

ATOMIC ENERGY ACT: COMMON DEFENSE AND SECURITY

Judgments of the Executive Branch regarding the common defense and security of the United States in export licensing proceedings involve matters of its foreign policy and national security expertise, and the NRC may properly rely on those conclusions. *Natural Resources Defense Council, Inc. v. NRC*, 647 F.2d 1345, 1364 (D.C. Cir. 1981).

MEMORANDUM AND ORDER

I. INTRODUCTION

The Nuclear Control Institute (NCI) has filed an amendment to its Petition for Leave to Intervene and Request for Hearing on Transnuclear, Inc.'s (Transnuclear) revised license application seeking to export highly enriched uranium (HEU) to The Netherlands. For the reasons discussed in this Memorandum and Order, we deny NCI's intervention and hearing request and order issuance of the license.

II. BACKGROUND

On May 7, 1991, Transnuclear filed a license application with the Commission seeking authorization to export 38.285 kilograms of HEU as fuel for the European

Commission's High Flux Reactor in Petten, The Netherlands (the Petten reactor). On July 3, 1991, the Nuclear Control Institute (NCI or Petitioners) filed a Petition for Leave to Intervene and Request for Hearing. Under the Commission's regulations found at 10 C.F.R. § 110.84(d), the Commission does not act on hearing requests or intervention petitions until it has received the Executive Branch's views on the merits of the application. The Commission received those views on June 2, 2000. Those views were supplemented by a separate letter dated July 31, 2000, containing an updated analysis of Transnuclear's revised license application prepared by Argonne National Laboratory (ANL).

Following submission of the license application and NCI's intervention petition, Congress enacted new requirements, commonly referred to as the Schumer Amendment, governing the export of HEU.¹ Following passage of the Schumer Amendment, the European Commission's Joint Research Center (JRC), which operates the Petten reactor, failed to provide the required assurances that it would convert the Petten reactor to use low enriched uranium (LEU) fuel. In light of the requirements imposed upon the export of HEU by the Schumer Amendment, the Executive Branch could not then recommend that the Commission approve Transnuclear's license application. The Executive Branch asked that the Commission keep the application pending while consultations with the European Commission and the JRC remained ongoing.

In a January 2000 exchange of formal diplomatic notes, the European Commission and the United States government agreed that the Petten reactor will be converted from HEU to LEU fuel as soon as a license has been issued by the Dutch regulatory authorities and an adequate supply of LEU fuel has been procured for the reactor. This agreement is contingent upon the U.S. government "making its best efforts" to obtain a supply of HEU fuel for the Petten reactor to permit continued operation of the facility until the conversion to LEU fuel has been completed. The diplomatic notes contain additional assurances *inter alia* that the Petten reactor will seek a license and LEU fuel in a timely manner; that the conversion process will involve active collaboration between experts at the JRC and the Department of Energy's National Laboratories; that the European

¹ The Schumer Amendment resulted in a new section 134 being added to the Atomic Energy Act. *See* 42 U.S.C. § 2160d. Section 134 of the AEA permits the issuance of a license for export of uranium enriched to 20% or more in the isotope 235 to be used as a fuel or target in a nuclear research or test reactor only if, in addition to the other requirements of the AEA, the NRC first determines that:

- (1) there is no alternative nuclear reactor fuel or target enriched in the isotope 235 to a lesser percent than the proposed export, that can be used in that reactor;
- (2) the proposed recipient of that uranium has provided assurances that, whenever an alternative nuclear reactor fuel or target can be used in that reactor, it will use that alternative in lieu of highly enriched uranium; and
- (3) the United States government is actively developing an alternative nuclear reactor fuel or target that can be used in that reactor.

42 U.S.C. § 2160d(a)(1)-(3). The Commission has incorporated these requirements into its regulations at 10 C.F.R. § 110.42(a)(9)(i).

Commission will keep the United States government informed of the progress being made toward licensing and conversion of the Petten reactor; that barring unforeseen licensing difficulties beyond the control of the European Commission, conversion of the Petten reactor will be completed by May 12, 2006; and that even if the conversion is not then complete, the Petten reactor will not operate using HEU fuel after May 12, 2006.

In light of these understandings, Transnuclear submitted a revised license application to the Commission dated February 11, 2000. This revised application seeks authorization to export 150.348 kilograms of HEU as fuel for the Petten reactor to be delivered over a 4-year period in annual tranches of 37.587 kilograms of HEU. The HEU in the form of metal will be fabricated into fuel elements by CERCA in France for the Petten reactor.

Transnuclear's revised application was submitted to the Executive Branch for its views on March 1, 2000. The Department of State provided the Commission with Executive Branch views on the merits of Transnuclear's application by letter dated June 2, 2000. These views were supplemented by a separate letter, dated July 31, 2000, enclosing an updated analysis performed by Argonne National Laboratory (ANL) detailing the Petten reactor's current HEU fuel status and additional HEU fuel needs in light of the proposed schedule to convert to LEU fuel use. The Executive Branch advised the Commission that the proposed export would not be inimical to the common defense and security of the United States and that the other requirements of the AEA had been met. With respect to the requirements of section 134 of the AEA (the Schumer Amendment), the Executive Branch further advised that the European Commission has agreed that it is feasible to convert the Petten reactor from HEU fuel to LEU fuel; the European Commission has committed to pursue conversion of the Petten reactor in a timely manner; and that ANL has an active DOE-funded program under way which has developed an LEU fuel suitable for use in the Petten reactor. In light of these findings, the Executive Branch has recommended approval of the license application.

On April 6, 2000, NCI amended its original 1991 Petition for Leave to Intervene and Request for Hearing. On June 27, 2000, NCI also provided the Commission with its response to the June 2, 2000 views of the Executive Branch. In light of the European Commission's commitment to convert the Petten reactor to LEU fuel use and the additional information provided by the JRC and the Executive Branch, NCI now agrees that the requirements of the Schumer Amendment have been met. NCI is therefore withdrawing the contentions set forth in its original July 3, 1991 petition and no longer opposes the granting of Transnuclear's license application. Amended Petition at 6, 8. As discussed below, however, NCI continues to believe that the Commission should impose conditions on the granting of this export license as a means of ensuring Transnuclear's compliance with applicable U.S.

law and policy governing the placing of HEU into international commerce. *Id.* at 6.

III. PETITIONER'S STANDING

Before turning to the merits of NCI's petition, the Commission first addresses the issue of NCI's standing. The Commission finds that NCI lacks standing to intervene in this proceeding as a matter of right. NCI is a nonprofit, educational corporation based in the District of Columbia actively engaged in disseminating information to the public concerning the proliferation, safety, and environmental risks associated with the use of weapons-useable nuclear materials, equipment, and technology. Amended Petition at 3 n.5 (referencing that section of NCI's original 1991 petition setting forth its interests). The Commission has long held, and NCI has previously conceded, that NCI's institutional interest in providing information to the public and the generalized interest of its membership in minimizing the danger from proliferation are insufficient to confer standing under section 189a of the Atomic Energy Act. *See, e.g., Transnuclear, Inc. (Export of 93.3% Enriched Uranium)*, CLI-99-15, 49 NRC 366, 367-68 (1999); *Transnuclear, Inc. (Export of 93.3% Enriched Uranium)*, CLI-98-10, 47 NRC 333, 336 (1998); *Transnuclear, Inc. (Export of 93.15% Enriched Uranium)*, CLI-94-1, 39 NRC 1, 4-6 (1994). The Commission in CLI-94-1 set forth the applicable legal principles and case law supporting this conclusion. There is no reason to repeat that discussion here, particularly since NCI again appears to recognize that it does not have standing to intervene in this proceeding as a matter of right. *See* Amended Petition at 8 n.10 (laying the basis for a discretionary hearing only).

The Commission has further considered whether to order a discretionary hearing in this proceeding. The Commission's regulations provide for a discretionary hearing if the Commission finds that a hearing would assist it in making the statutory determinations required by the AEA and be in the public interest. 10 C.F.R. § 110.84(a). NCI asserts that a full and open hearing would assist the Commission and be in the public interest. Amended Petition at 7-8. However, as discussed below, in its June 27, 2000 response to the Executive Branch view's, NCI conceded that the statutory requirements set forth in the Schumer Amendment governing HEU exports have been met. Moreover, there is nothing in NCI's petition indicating that it possesses special knowledge or that it will present significant information not already available to and considered by the Commission. A discretionary hearing would therefore impose unnecessary burdens on the participants without assisting the Commission in making its statutory findings under the AEA. For these reasons, we find that a discretionary hearing is not warranted in this proceeding.

IV. STATUTORY REQUIREMENTS FOR AUTHORIZATION OF EXPORT OF HEU FUEL

NCI's April 6, 2000 amended petition, which it submitted prior to receiving a copy of the Agreement entered into between the United States and the European Union discussed above, set forth three issues that NCI believed the Commission needed to resolve before issuing an export license to Transnuclear. First, NCI's amended petition asserts that Transnuclear had not provided adequate documentation allowing the Commission to determine that the requirements of the Schumer Amendment have been met. Second, NCI's amended petition asserts that the Commission must ensure that the conversion of the Petten reactor to LEU fuel is carried out as expeditiously as possible in order to minimize the amount of HEU placed into international commerce. NCI contends that Transnuclear has not established through documentary or other submissions to the Commission that conversion of the Petten reactor will take 4 years. NCI thus argues that approval of a 4-year license risks providing fresh HEU that the Petten reactor may not actually need. Third, NCI argues in its amended petition that the Commission should condition approval of the license on obtaining a commitment prohibiting the retransfer to alternate end users of any U.S.-origin HEU intended for the Petten reactor but which ultimately may prove in excess of the reactor's actual needs.

New information made available to both the Commission and NCI in the European Commission's May 3, 2000 submission to the Commission and the Executive Branch's June 2, 2000 and July 31, 2000 letters to the Commission addresses these concerns. In light of this new information, NCI now acknowledges that the requirements of the Schumer Amendment have been met and does not oppose the export of HEU for use as fuel in the European Commission's Petten reactor. *See* Response of Petitioner, Nuclear Control Institute to the Executive Branch Views on the Petten Application (Response of Petitioner) at 1. The Commission agrees that the requirements set forth in the Schumer Amendment have been met. However, the two remaining issues raised by NCI warrant further discussion.

A. Progress of the Conversion Process

NCI contends that Transnuclear has not provided adequate documentation to the Commission showing that conversion of the Petten reactor will actually take 4 years. NCI believes that the Commission is therefore unable to ensure that conversion of the Petten reactor will be carried out in a timely and expeditious manner. NCI believes that approval of the requested 4-year license provides a disincentive for expeditious conversion of the Petten reactor to LEU fuel use.

Amended Petition at 9. NCI therefore requests that conditions be placed on the granting of this license requiring annual status reports by Transnuclear, a response to the reports by the Executive Branch, a public meeting if necessary, and an opportunity for the Commission to modify, suspend, or revoke the license should the Commission determine that conversion of the Petten reactor is not proceeding in an expeditious manner. *Id.* at 9-10; *see also* Response of Petitioner at 3.

In the January 2000 exchange of formal diplomatic notes, the European Commission provided the United States government with firm assurances that the Petten reactor will be converted from HEU fuel to LEU fuel as soon as the conversion has been licensed by regulatory authorities in The Netherlands and a supply of LEU fuel procured for the Petten reactor.² The Commission believes, based on the information currently available to it, that the revised JRC conversion schedule as set forth in the Executive Branch's July 31, 2000, supplemental letter and the attached ANL analysis is reasonable. This revised schedule envisages completion of Phase 1 analyses of certain technical design parameters (e.g., the number of fuel plates per fuel assembly and the U-235 content of the assembly) by September 2000. The JRC then plans to procure two LEU prototype fuel assemblies to verify that there are no fuel assembly fabrication problems and to perform reactivity measurements. Procurement and irradiation of these prototypes is expected to be completed by September 2002. In Phase 2, the JRC and the Department of Energy's Reduced Enrichment for Research and Test Reactors (RERTR) program will conduct safety analyses needed to obtain a license from Dutch regulatory authorities for conversion of the Petten reactor to LEU fuel. These analyses are expected to begin in October 2000 and will take 1.5-2 years to complete. In Phase 3, the JRC plans to update the Petten reactor's licensing documentation for review by Dutch regulatory authorities. Review and approval of this documentation and completion of the licensing process are expected to be completed before the end of 2003. Once a license has been obtained, the JRC plans to procure a 1-year supply of LEU fuel assemblies during 2004. LEU conversion of the Petten reactor will begin around May 2005 to ensure conversion of the entire core prior to May 12, 2006.³

The Commission notes that uncertainties remain regarding the timing of the conversion schedule, particularly with regard to obtaining the necessary regulatory approvals from the appropriate authorities in The Netherlands. The Commission also notes that in the January 2000 exchange of formal diplomatic notes the

²The Commission has previously found that these types of diplomatic notes can constitute assurances sufficient to satisfy the applicable requirements of the Atomic Energy Act. *See Transnuclear, Inc.* (Export of 93.3% Enriched Uranium), CLI-99-20, 49 NRC 469, 473-74 (1999), *citing id.*, CLI-98-10, 47 NRC at 338 n.5.

³The Commission also notes that the European Commission has provided the United States government with a firm commitment that the Petten reactor will not operate on HEU fuel after May 12, 2006, even if the conversion process is not completed by this date. The Commission believes that this commitment provides a powerful incentive for the European Commission to ensure a timely conversion of the Petten reactor to LEU fuel use.

European Commission undertook to keep the United States government informed of the progress made toward licensing and conversion of the Petten reactor and that ANL experts will also maintain a close cooperative relationship with the operators of the Petten reactor as the conversion process proceeds. The Commission intends to closely monitor the progress made in meeting the conversion schedule and will be prepared to consider any adjustments to the license required by changed circumstances.

B. The Risk of Retransfer of Excess HEU

NCI contends that approval of a 4-year license risks facilitating the retransfer of HEU from the Petten reactor to alternate end-users within EURATOM, either by freeing up the Petten reactor's existing supply of previously exported HEU for retransfer or by providing fresh HEU in excess of the Petten reactor's actual requirements that would then be available for retransfer. Amended Petition at 12-13. In light of these concerns, NCI requests that the Commission impose license conditions designed to prevent the JRC from retransferring HEU in excess of the Petten reactor's actual needs to other facilities within EURATOM. Specifically, NCI requests that conditions be placed on the granting of this license requiring a commitment that the JRC will exhaust its existing supply of HEU prior to irradiating any of the HEU requested in the pending license application and that any HEU exported under this license in excess of the Petten reactor's actual needs will either be blended down to LEU or returned to the United States. Response of Petitioner at 4-5.

NCI has correctly pointed out that under the Agreement for Cooperation in the Peaceful Uses of Nuclear Energy Between EURATOM and the United States of America, the European Commission is not required to obtain the consent of the United States government for the retransfer of U.S.-supplied HEU among the member nations of EURATOM. However, the Commission concludes that, as a practical matter, the risk of such a retransfer in the present case is slight.

Argonne National Laboratory's analysis of Transnuclear's revised export license application provides detailed information on the Petten reactor's current inventory of HEU. This analysis confirms that as of December 31, 1999, the Petten reactor's useable unirradiated U-235 inventory was only sufficient to allow normal reactor operation from January 2000 until May 2001. The pending export license requests sufficient HEU to extend normal reactor operation for about 4 years, from May 2001 until May 2005, when conversion to LEU fuel use is scheduled to begin. It thus appears that the Petten reactor will require all of its existing supply of HEU to continue normal operations until the first shipment of fresh HEU shipped under this license is received in approximately May 2001. Based on ANL's analysis, the Commission is convinced that approval of the pending export license application will not result in freeing up the Petten reactor's

existing supply of previously exported HEU for retransfer to alternate end-users within EURATOM.

NCI is also concerned that approving a 4-year license risks providing HEU in excess of the Petten reactor's actual requirements that would then be available for retransfer to alternate end-users within EURATOM. This concern is integrally related to NCI's argument that conversion of the Petten reactor should not take 4 years. Based on the information currently available to it, the Commission believes that the revised JRC conversion schedule is reasonable. According to the analysis conducted by ANL, the 150.348 kilograms of HEU requested under the revised export license application meets the Petten reactor's current annual requirements over the course of the proposed export license and is not likely to result in the accumulation of significant amounts of excess HEU that would then be available for retransfer to alternate end-users within EURATOM.

The Commission further notes that this export license would authorize the export of HEU in annual shipments not to exceed 37.587 kilograms per year over a 4-year period. This gives the Commission the ability to monitor the conversion process and adjust the license as necessary to avoid the potential accumulation of HEU fuel significantly in excess of the Petten reactor's actual needs. The January 2000 exchange of formal diplomatic notes between the United States government and the European Commission provides that the European Commission will keep the United States government informed of the progress made toward licensing and conversion of the Petten reactor. The Commission therefore requests that the Executive Branch provide the Commission with annual reports detailing the status of the Petten reactor's conversion effort. Should the amount of HEU authorized for export under this license exceed the Petten reactor's actual needs, the Commission can then determine what action, if any, it should take.

This export license application requests authorization to export 150.348 kilograms of HEU in annual shipments of 37.587 kilograms per year over a 4-year period. There is a request pending before the United States government pursuant to section 131 of the AEA to retransfer 16.195 kilograms of U.S.-origin HEU from Switzerland to The Netherlands for use in the Petten reactor during the effective period of this export license. Based on the information currently available to it, the Commission believes that the Petten reactor will require the full 150.348 kilograms of HEU fuel requested in Transnuclear's revised license application to continue normal operations over the 4-year life of the proposed export license. However, presuming that DOE will approve this retransfer, the Commission is only authorizing export of 134.153 kilograms of HEU under this license. This reduction from the requested amount takes into account the 16.195 kilograms of HEU the Petten reactor is likely to receive from Switzerland and ensures that the total amount of HEU that the Petten reactor receives under this license and as a result of an approved retransfer will not exceed the 150.348

kilograms of HEU requested by Transnuclear in its revised license application. Furthermore, the total quantity of HEU fuel exported for the Petten reactor under this license shall not exceed 37.875 kilograms of HEU in any given calendar year. In the event that this retransfer is not approved by DOE, the Licensee can request a license amendment for additional HEU fuel.

C. Other Export Licensing Criteria

As part of its licensing decision the Commission must determine whether the other applicable licensing criteria have been satisfied. There is no doubt that the nonproliferation criteria set forth in sections 127 and 128 of the AEA have been met. The Netherlands is a party to the Treaty on the Nonproliferation of Nuclear Weapons and the Convention on the Physical Protection of Nuclear Materials. The Netherlands government places all of its peaceful nuclear activities under International Atomic Energy Agency (IAEA) safeguards and adheres to the IAEA Recommendations on the Physical Protection of Nuclear Materials (INFCIRC/225/rev. 4). Additionally, The Netherlands has also adopted the Nuclear Supplier Group Guidelines and is a member of the NPT Exporters Committee (“Zanger Committee”). Finally, EURATOM by letter dated March 31, 2000, has confirmed that this proposed export would be subject to all the terms and conditions of the existing Agreement for Cooperation in the Peaceful Uses of Nuclear Energy Between EURATOM and the United States of America.

The Department of State, in its June 2, 2000 letter transmitting the views of the Executive Branch, determined “that the proposed export would not be inimical to the common defense and security of the United States.” In making this determination the Department of State, as required by section 133 of the AEA, consulted with the Department of Defense to confirm that physical protection measures will be adequate to deter theft, sabotage, and other acts of international terrorism that would result in the diversion of the material during the export process.

Judgments of the Executive Branch regarding the common defense and security of the United States involve matters of its foreign policy and national security expertise, and the NRC may properly rely on those conclusions. *See Natural Resources Defense Council, Inc. v. NRC*, 647 F.2d 1345, 1364 (D.C. Cir. 1981). Although the Commission is mindful of NCI’s concerns, we hold that the Executive Branch conclusions and The Netherlands’ longstanding commitment to nonproliferation support a finding that this proposed export will not be inimical to the common defense and security of the United States.

V. ISSUANCE OF THE LICENSE

The Commission has determined that the export licensing criteria set forth in the Atomic Energy Act are satisfied and directs the Office of International Programs to issue license XSNM-02611 to Transnuclear, Inc., for the export of 134.153 kilograms of HEU. The Commission specifically finds that the export licensing criteria set forth in AEA sections 127, 128, and 134 have been met. Moreover, the Commission determines pursuant to AEA sections 53 and 57 that issuance of this license would not be inimical to the common defense and security of the United States or constitute an unreasonable risk to the health and safety of the public.

To facilitate the Commission's ongoing monitoring of the conversion of the Petten reactor, the Commission requests that the Executive Branch prepare annual reports on the status of the Petten reactor's conversion effort. The first annual report should be provided to the Commission by the Executive Branch with any relevant comments 1 year after the issuance of this Order. Further annual reports will be due no later than 365 days after submission of the first annual report. The Commission intends to place these reports in its Public Document Room. Therefore, any proprietary information should be handled as an annex to the reports so that the proprietary information can be easily segregated from the rest of the report.

It is so ORDERED.

For the Commission⁴

ANNETTE L. VIETTI-COOK
Secretary of the Commission

Dated at Rockville, Maryland,
this 24th day of August 2000.

⁴Commissioner Diaz was not available for affirmation of this Memorandum and Order. Had he been present, he would have affirmed the Memorandum and Order.

UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

COMMISSIONERS:

Richard A. Meserve, Chairman
Greta Joy Dicus
Nils J. Diaz
Edward McGaffigan, Jr.
Jeffrey S. Merrifield

In the Matter of

Docket No. 50-271-LT

**VERMONT YANKEE NUCLEAR
POWER CORPORATION and
AMERGEN VERMONT, LLC
(Vermont Yankee Nuclear Power
Station)**

August 30, 2000

CAN's motion for stay and request for investigation are denied, and its motion for clarification is granted.

LICENSE TRANSFERS

Once an applicant or group of applicants submits a license transfer application to the NRC, our Staff conducts a review of the application to determine whether it satisfies various requirements (e.g., financial qualifications, technical qualifications, foreign ownership restrictions). If no person seeks a hearing on the application, the Staff's review is the only review the application will receive (unless the Commission itself takes the unusual step of reviewing the application *sua sponte*). If a person does seek intervention and a hearing on the application, then the Commission itself conducts an independent adjudicatory review of the petition to intervene and request for hearing, to determine whether the petitioner both has standing and has raised at least one admissible issue. If the Commission grants intervention and a hearing, it will then adjudicate any admissible issues

that petitioner raises regarding the application. This latter review often occurs simultaneously with, but is always separate from, the Staff's review.

Even if, prior to the Staff's completion of its own review of the license transfer application, the Commission issues an adjudicatory order either finding all challenges to the application to be inadmissible or finding all admitted issues to be without merit, the Staff will still need to grant the application if the application is to receive the agency's final approval. (This is because the Staff review may cover issues not raised in the adjudication.) Likewise, if the Staff approves the application prior to the Commission completing its adjudication, the application will lack the agency's final approval until and unless the Commission concludes the adjudication in the applicant's favor. In the latter situation, our procedural rules (10 C.F.R. Part 2, Subpart M) leave license transfer applicants who have received Staff approval but are still awaiting the results of a Commission adjudication free to act in reliance on the Staff's order. *See generally* 10 C.F.R. § 2.1327. However, they do so at their peril in the event that the Commission later determines that intervenors have raised valid objections to the license transfer application. In such a case, the Commission may require that the license be rescinded.

RULES OF PRACTICE: STAY REQUESTS

LICENSE TRANSFERS: STAY REQUESTS

When ruling on stay motions in license transfer proceedings, the Commission applies a four-pronged test set forth in 10 C.F.R. § 2.1327(d):

- (1) Whether the requestor will be irreparably injured unless a stay is granted;
- (2) Whether the requestor has made a strong showing that it is likely to prevail on the merits;
- (3) Whether the granting of a stay would harm other participants; and
- (4) Where the public interest lies.

RULES OF PRACTICE: STAY REQUESTS

LICENSE TRANSFERS: STAY REQUESTS

Irreparable injury is the most crucial factor. *See Alabama Power Co.* (Joseph M. Farley Nuclear Plant, Units 1 and 2), CLI-81-27, 14 NRC 795, 797 (1981). (While the *Farley* decision involved a stay request filed under 10 C.F.R. § 2.788, the factors for a stay under Subpart M are essentially identical.)

MEMORANDUM AND ORDER

On July 14, 2000, the Citizens Awareness Network (CAN) filed a motion for stay, a motion for clarification, and a request for investigation — all concerning the NRC Staff's July 7th order approving the transfer of Vermont Yankee Nuclear Power Station's license from Vermont Yankee Nuclear Power Corporation (Vermont Yankee) to AmerGen Vermont, LLC (AmerGen Vermont). CAN asserts that the Staff issued its order without issuing a Safety Evaluation Report (SER), without notifying the parties who had sought intervention and a hearing regarding the license transfer, and without "subsequent proper notice" of the order's issuance.

CAN seeks clarification as to the Staff's procedures. In particular, CAN seeks an explanation of the procedures that led to the Staff's purported "failure to provide a notice or order" prior to the Commission's issuance of a ruling on CAN's hearing request in this proceeding. CAN also seeks a Commission order directing the Staff to issue an SER prior to approving the license transfer at issue here. CAN further requests both the details and basis of the Staff's decision and an opportunity to appeal that decision. Finally, CAN requests that the Commission initiate an independent investigation of the Staff's decisionmaking process that led to the issuance of the Staff order in question.

Vermont Yankee and AmerGen Vermont oppose CAN's various requests. For the reasons set forth below, CAN's motion for stay and request for investigation are denied, and its motion for clarification is granted.

DISCUSSION

CAN's requests for clarification and investigation (and its motion for stay as well) are based on CAN's erroneous assumption that the July 7th order represented the Commission's last word on the license transfer application. The error apparently stemmed from CAN's incomplete reading of an NRC press release whose opening sentence stated that "the Commission had decided to grant the license [transfer] application." *See* Motion at 3-4. *See also* OPA [Office of Public Affairs Notice] No. 00-109 (July 10, 2000)). This statement, when taken out of context, gives the erroneous impression that it was the Commission, not the Staff, that had issued the approving order.¹ However, the press release later states:

¹On a separate matter, CAN describes a telephone call to CAN from NRC's Region I, in which the Region stated that the "Staff had decided to enter the proceeding and would be taking the position that the license transfer at issue should be approved." Motion at 3. Although we cannot be sure what was said during the telephone call described

(Continued)

The Commission received two requests for hearing. One hearing request was from the State of Vermont Department of Public Service, dated February 23. A second hearing request was filed by the Citizens Awareness Network, dated February 22. *Commission review of these hearing requests is pending.*

The technical staff's approval becomes effective immediately. However, the petitioners could request the Commission issue a stay preventing the license transfer from proceeding, or, *if the Commission decides to grant a hearing and rules in favor of the petitioners, the Commission could rescind the license transfer.*

(Emphasis added). This language made clear that the Commission itself had not yet issued its adjudicatory decision. Similar information was also set forth in the NRC Staff's July 7th order itself, which stated that "Commission review of [CAN's and the State of Vermont's] hearing requests is pending." Staff Order at 2.

Although the Staff faxed CAN a copy of the order on July 7th, the fax apparently never arrived. When the Staff learned on July 14th that CAN had not received the earlier fax, the Staff immediately faxed CAN both the July 7th order and the July 7th SER (with proprietary information deleted), and confirmed that a CAN representative had received all faxed pages of both documents. From these facts, we conclude that CAN's request for an investigation of the events leading up to the issuance of the Staff's July 7th order is based on a misunderstanding of what documents the Staff issued and when they were issued. We therefore decline to conduct the requested investigation.

Based on CAN's submittal, it appears that CAN does not have a full understanding of how this agency reviews license transfer applications. Once an applicant or group of applicants submits a license transfer application to the NRC, our Staff conducts a review of the application to determine whether it satisfies various requirements (e.g., financial qualifications, technical qualifications, foreign ownership restrictions). If no person seeks a hearing on the application, the Staff's review is the only review the application will receive (unless the Commission itself takes the unusual step of reviewing the application *sua sponte*). If a person does seek intervention and a hearing on the application, then the Commission itself conducts an independent adjudicatory review of the petition to intervene and request for hearing, to determine whether the petitioner both has standing and has raised at least one admissible issue. If the Commission grants intervention and a hearing, it will then adjudicate any admissible issues that petitioner raises regarding the application. This latter review often occurs simultaneously with, but is always separate from, the Staff's review.

in the Motion, the Staff has not sought to become a party in this adjudication and, so far as we are aware, has no intention of doing so. The Staff may be required to provide one or more witnesses to sponsor and support the SER if the proceeding goes to hearing (*see* 10 C.F.R. § 2.1316(b)), but this is not the same as the Staff actually participating as a party in the case.

Even if, prior to the Staff's completion of its own review of the license transfer application, the Commission issues an adjudicatory order either finding all challenges to the application to be inadmissible or finding all admitted issues to be without merit, the Staff will still need to grant the application if the application is to receive the agency's final approval. (This is because the Staff review may cover issues not raised in the adjudication.) Likewise, if the Staff approves the application prior to the Commission completing its adjudication, the application will lack the agency's final approval until and unless the Commission concludes the adjudication in the Applicant's favor. In the latter situation, our procedural rules (10 C.F.R. Part 2, Subpart M) leave license transfer applicants who have received Staff approval but are still awaiting the results of a Commission adjudication free to act in reliance on the Staff's order. *See generally* 10 C.F.R. § 2.1327. However, they do so at their peril in the event that the Commission later determines that intervenors have raised valid objections to the license transfer application. In such a case, the Commission may require that the license be rescinded.

Even though the Staff here has concluded its review of the Vermont Yankee application and issued both its SER and its order approving the license transfer on July 7th, the adjudicatory portion of this license transfer proceeding is still very much alive. We are still considering the admissibility of issues proffered by CAN and the State of Vermont. Consequently, the Commission has not violated CAN's procedural rights either to a reasoned adjudicatory decision or to proper notice of that adjudicatory decision.

Finally, we turn to CAN's request for stay of the Staff's order. When ruling on stay motions in license transfer proceedings, the Commission applies a four-pronged test set forth in 10 C.F.R. § 2.1327(d):

- (1) Whether the requestor will be irreparably injured unless a stay is granted;
- (2) Whether the requestor has made a strong showing that it is likely to prevail on the merits;
- (3) Whether the granting of a stay would harm other participants; and
- (4) Where the public interest lies.

In ruling on stay requests, the Commission has held that irreparable injury is the most crucial factor. *See Alabama Power Co. (Joseph M. Farley Nuclear Plant, Units 1 and 2), CLI-81-27, 14 NRC 795, 797 (1981).*² Here, at this time, we see no irreparable injury to CAN if its stay request is denied. CAN's alleged concerns are procedural harms which we have either remedied (the Staff providing a copy of the order) or which did not occur (failure to serve a final Commission adjudicatory order, denial of an opportunity to be heard, failure to issue a rational adjudicatory

²While the *Farley* decision involved a stay request filed under 10 C.F.R. § 2.788, the factors for a stay under Subpart M are essentially identical.

decision, failure to give proper notice of the denial of a hearing request, improper notice that the Staff intended to become a party). Moreover, the issuance of the Staff's July 7th order does not prejudice CAN's ability to participate meaningfully in this proceeding. CAN has taken full advantage of its opportunity to challenge the licence transfer application — filing a 55-page petition to intervene, replete with numerous attachments.

Turning to the remaining factors, we see no harm to any other participant if the stay were granted (factor 3).³ CAN fails to make any showing concerning the likelihood of success on the merits (factor 1). CAN focuses instead on the perceived procedural deficiencies, addressed above. Finally, we see no particular reasons why the public would either benefit or suffer as a result of the issuance of a stay (factor 4). Under these circumstances, CAN's stay request is *denied*.

IT IS SO ORDERED.

For the Commission⁴

ANNETTE L. VIETTI-COOK
Secretary of the Commission

Dated at Rockville, Maryland,
this 30th day of August 2000.

³ According to Applicants' Status Report of July 28, 2000, the instant license transfer awaits not only our approval but also, in one manner or another, the approval of the Federal Energy Regulatory Commission, the Internal Revenue Service, the Securities and Exchange Commission, the Vermont Public Service Board, the Massachusetts Department of Telecommunications and Energy, the Connecticut Department of Public Utilities Control, the New Hampshire Public Utilities Commission, and the Pennsylvania Public Utility Commission.

On a related matter, we grant CAN's July 31st motion to strike the final paragraph of the Applicants' Status Report. Applicants' discussion went beyond the parameters of a Status Report and constituted an unauthorized second response to CAN's Stay Motion. *See* 10 C.F.R. § 2.1327(c).

⁴ Commissioners Diaz and McGaffigan were not present for the affirmation of this Order. If they had been present, they would have approved it.

UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

ATOMIC SAFETY AND LICENSING BOARD

Before Administrative Judges:

G. Paul Bollwerk, III, Chairman
Frederick J. Shon
Dr. Peter S. Lam

In the Matter of

Docket No. 50-400-LA
(ASLBP No. 99-762-02-LA)

CAROLINA POWER & LIGHT
COMPANY
(Shearon Harris Nuclear Power
Plant)

August 7, 2000

In this 10 C.F.R. Part 2, Subpart K proceeding, ruling on the admissibility of four late-filed contentions challenging the NRC Staff's environmental assessment determination not to prepare a environmental impact statement (EIS) under the National Environmental Policy Act of 1969 (NEPA) regarding Applicant Carolina Power & Light Company's (CP&L) request to increase the spent fuel storage capacity of its Shearon Harris Nuclear Power Plant through a 10 C.F.R. § 50.90 facility operating license amendment, the Licensing Board finds one of the contentions admissible under the 10 C.F.R. § 2.714(a)(1), (b), and (d) standards governing late-filed issues and establishes a schedule for its further litigation.

RULES OF PRACTICE: NONTIMELY SUBMISSION OF
CONTENTIONS

Relative to late-filed contentions, it is well established that the burden rests with the petitioner to address affirmatively all five factors and demonstrate that, on balance, they warrant excusing the lateness of the filing. Moreover, even if

a late-filed contention fulfills the section 2.714(a)(1) requirements, it must still satisfy the admissibility standards set forth in section 2.714(b)(2)(i)-(iii), (d)(2), in order to receive merits consideration. *See, e.g., Private Fuel Storage, L.L.C. (Independent Spent Fuel Storage Installation), LBP-99-43, 50 NRC 306, 312 (1999) (citing cases), petition for interlocutory review denied, CLI-00-2, 51 NRC 77 (2000).*

RULES OF PRACTICE: NONTIMELY SUBMISSION OF CONTENTIONS (GOOD CAUSE FOR DELAY)

It is, of course, also well established that the first section 2.714(a)(1) factor — whether there is “good cause” for the failure to file on time — is the most important component in the late-filed balancing equation.

RULES OF PRACTICE: NONTIMELY SUBMISSION OF CONTENTIONS

Relative to the section 2.714(a)(1) late-filing test, among the four non-good cause factors three and five — assistance in developing a sound record and broadening the issues and delaying the proceeding — are given more weight in the balancing process. *See Commonwealth Edison Co. (Braidwood Nuclear Power Station, Units 1 and 2), CLI-86-8, 23 NRC 241, 244-45 (1986).*

NEPA: REQUIREMENT FOR IMPACT STATEMENT; REMOTE AND SPECULATIVE EVENT

The standard for requiring that an EIS be prepared is whether the action at issue is a major federal action having a significant impact on the human environment. Further, the agency is not required to address in an EIS consequences of an action that are “remote and speculative.”

NEPA: CONSIDERATION OF SEVERE ACCIDENTS; REMOTE AND SPECULATIVE EVENT

Over the past decade the Commission has come to rely on probabilistic analysis ever more heavily in the process of making decisions. Indeed, the entire trend in licensing, enforcement, inspection, and the granting of amendments has swung gradually toward decision-making by probabilistic risk assessment. In the NEPA context, deciding what is “remote and speculative” by examining the probabilities inherent in a proposed accident scenario is thus appropriate.

NEPA: SUFFICIENCY OF CONTENTIONS (SABOTAGE)

Assertions regarding sabotage risk do not provide a litigable basis for a contention asserting that an environmental impact statement should be prepared for a spent fuel pool expansion request. *See Philadelphia Electric Co.* (Limerick Generating Station, Units 1 and 2), ALAB-819, 22 NRC 681, 701 (1985), *review declined*, CLI-86-5, 23 NRC 125 (1986), *aff'd*, *Limerick Ecology Action v. NRC*, 869 F.2d 719, 744 (3d Cir. 1989).

RULES OF PRACTICE: DISCOVERY (AGAINST ADVISORY COMMITTEE ON REACTOR SAFEGUARDS)

Any attempt to obtain discovery materials or testimony from Advisory Committee on Reactor Safeguards (ACRS) members, staff, or consultants is subject to the exceptional circumstances showing of 10 C.F.R. § 2.720(h). *See Pacific Gas and Electric Co.* (Diablo Canyon Nuclear Power Plant, Units 1 and 2), ALAB-519, 9 NRC 42, 43 n.2 (1979).

**MEMORANDUM AND ORDER
(Ruling on Late-Filed Environmental Contentions)**

Pending before the Licensing Board is the motion of Intervenor Board of Commissioners of Orange County, North Carolina (BCOC), seeking admission of four late-filed contentions. Each of these issue statements concerns the purported need for the NRC Staff to prepare an environmental impact statement (EIS) regarding the pending request of Applicant Carolina Power & Light Company (CP&L) for an amendment to its operating license for its Shearon Harris Nuclear Power Plant (Harris) to permit the addition of rack modules to spent fuel pools (SFPs) C and D and to place those pools in service. Although both CP&L and the Staff declare that a balancing of the five late-filing elements of 10 C.F.R. § 2.714(a) weighs in favor of admitting the contentions, they nonetheless assert that the contentions should be rejected as lacking adequate basis and specificity as required by section 2.714(b), (d).

For the reasons set forth below, we find that (1) the section 2.714(a) balancing process supports admission of the contentions notwithstanding their “lateness”; and (2) one of the environmental contentions, which we redesignate as Environmental Contention (EC)-6, should be admitted, subject to the limitations described herein. Additionally, we establish a schedule for the further litigation of contention EC-6.

I. BACKGROUND

The question of the admission for litigation of the general subject matter of the four late-filed contentions now before the Board first arose in the context of BCOC's initial, timely filed contentions. In its April 5, 1999 supplement to its February 1999 hearing petition, BCOC proffered five issue statements, which were designated EC-1 through EC-5, challenging CP&L and Staff compliance with the requirements of the National Environmental Policy Act of 1969 (NEPA) relative to the Applicant's SFP expansion amendment. Among other things, those contentions asserted that the proposed license amendment was not exempt from NEPA's requirements under 10 C.F.R. § 51.22; that an EIS was required that addressed amendment effects on Harris accident probability and consequences and alternative costs and benefits, including severe accident mitigation design alternatives (SAMDA) and dry cask storage; that the EIS needed to address storage of spent fuel from CP&L's Brunswick and Robinson plants; that an environmental assessment must be conducted; and that a discretionary EIS is required under 10 C.F.R. §§ 51.20(b)(14), 51.22(b). As we described in our July 1999 memorandum and order ruling on the admissibility of those five contentions, as a result of a superseding Staff determination to prepare an environmental assessment (EA) relating to the proposed CP&L license amendment, we concluded BCOC's concerns were premature and dismissed those contentions, albeit without prejudice to their being raised at a later juncture, as appropriate. *See* LBP-99-25, 50 NRC 25, 38-39 (1999).

In that same issuance, we admitted two of BCOC's technical contentions that thereafter were subject to litigation in accordance with the provisions of 10 C.F.R. Part 2, Subpart K. While the parties were preparing for 10 C.F.R. § 2.1113 oral presentations to the Board on the issue of whether there were disputed material facts that warranted further exploration in an evidentiary hearing relative to the admitted BCOC technical contentions, the Staff provided the Board and the other parties with a Board Notification indicating that on December 15, 1999, it had issued an EA regarding the CP&L amendment request. *See* Letter from Richard J. Laufer, Project Manager, NRC Office of Nuclear Reactor Regulation to Licensing Board and Parties (Jan. 10, 2000). In its EA, which was published in the Federal Register on December 21, 1999, the Staff concluded that an EIS was unnecessary relative to the CP&L spent fuel pool expansion request because it did not involve a proposed action that would have a significant effect on the quality of the human environment. *See* 64 Fed. Reg. 71,514, 71,516 (1999).

Relative to this EA, on January 31, 2000, BCOC filed the request for admission of four late-filed NEPA-related contentions that is now pending with the Board. In these contentions, which are numbered EC-1 through EC-4, BCOC challenges the Staff's EA, asserting that (1) an EIS must be prepared because the proposed Harris SFP expansion would create accident risks substantially in excess of those the

Staff identified in the EA or previously evaluated in the Harris operating license EIS that would significantly affect the quality of the human environment; (2) the EIS that must be prepared must evaluate the significant cumulative environmental risk posed by the operation of pools A, B, C, and D that was not acknowledged in the EA; (3) the EIS that must be prepared must include within its scope an analysis of the impacts of storage of spent fuel from the Brunswick and Robinson nuclear power plants; and (4) a discretionary EIS is needed. BCOC further asserts that a balancing of the five late-filing elements of 10 C.F.R. § 2.714(a)(1) supports a finding that the timing of its filing should not be a bar to their admission. Additionally, BCOC provides information regarding the grounds for each contention that it declares is sufficient to provide the requisite specificity and basis in accordance with the substantive contention admission standards in section 2.714(b), (d). *See* [BCOC] Request for Admission of Late-Filed Environmental Contentions (Jan. 31, 2000) at 23-27 [hereinafter BCOC Contentions Request].

On March 3, 2000, CP&L and the Staff filed responses to the BCOC late-filed request. Both assert that section 2.714(a) late-filing factors three and five — developing a sound record and broadening or delaying the proceeding — do not support late-filed admission. In particular, both suggest relative to factor three that BCOC supporting affiant Dr. Gordon Thompson lacks the requisite education, qualifications, and experience to assist the Board in developing a sound record. Neither, however, contests that BCOC has established that the paramount “good cause” factor, along with factors two and four — availability of other means or parties to protect BCOC’s interests — all weigh in favor of admitting the contentions, thereby tipping the overall balance in favor of a finding that late-filing does not bar admission of the contentions. *See* [CP&L] Response to BCOC’s Late-Filed Environmental Contentions (Mar. 3, 2000) at 1-2 [hereinafter CP&L Contentions Response]; NRC Staff Response to [BCOC] Request for Admission of Late-Filed Environmental Contentions (Mar. 3, 2000) at 1-4 [hereinafter Staff Contentions Response].

What CP&L and the Staff do dispute is BCOC’s claim that the contentions fulfill the pleading requirements of section 2.714, asserting for various reasons that each of the contentions lacks the requisite specificity and basis. *See* CP&L Contention Response at 7-29; Staff Contention Response at 7-29. In a March 13, 2000 reply to the CP&L and Staff responses, BCOC challenges their claims regarding the adequacy of Dr. Thompson’s qualifications relative to late-filing factor three as well as their assertions concerning the adequacy of the four contentions. *See* [BCOC] Reply to [CP&L’s] and Staff’s Oppositions to Request for Admission of Late-Filed Environmental Contentions (Mar. 13, 2000) at 1-22 [hereinafter BCOC Contentions Reply].

Subsequently, it came to the Board’s attention that there was outstanding on the public record a recent draft Staff technical study concerning spent fuel pool accident risks, *see* 65 Fed. Reg. 8752 (2000) (soliciting public comment on draft

report), which was one of the matters that was of concern to BCOC in the context of its contention denominated as EC-1, Environmental Impact Statement Required. Although recognizing that this Staff report dealt with spent fuel pool accident risks associated with facility decommissioning activities, the Board provided the parties with an opportunity to provide their views, and respond to the views of the other parties, on the relevance, if any, of this study to the issues before the Board. *See* Memorandum and Order (Requesting Additional Information) (Mar. 21, 2000) at 1-2 (unpublished). Thereafter, all three of the parties filed comments regarding the draft Staff report. BCOC asserted that although the study's limited scope — i.e., decommissioning — restricted its relevance, the Staff's technical analysis still was pertinent in that it (1) further illustrates how the Staff has underestimated the risks of SFP accidents because that study does not include an assessment of the phenomena associated with partial exposure of fuel assemblies, a subject that is at the center of Dr. Thompson's concerns about the SFP accident risks; (2) fails to consider the effect of fuel age on potential for propagation of exothermic reactions; (3) does not discuss criticality accident risk from the placement of low-burnup fuel in a pool in which there is reliance on burnup credit to prevent criticality; and (4) lacks sufficient information regarding zirconium fire propagation. *See* [BCOC] Response to Board's Information Request (Mar. 29, 2000) at 2-10; *see also* [BCOC] Reply to [CP&L's] and Staff's Responses to Board's Information Request (Apr. 5, 2000) at 2-7. Both CP&L and the Staff, on the other hand, found the draft report basically irrelevant to the admission of the contention because it concerns a decommissioned reactor rather than an operating reactor like Harris, although each found points in the draft report, such as the availability and timing of pool water makeup, that supported its position that BCOC contention EC-1 was not admissible. *See* [CP&L] Response to Board's Request Regarding Relevance of Staff's Draft Final Technical Study of Spent Fuel Pool Accident Risk at Decommissioning Plants (Mar. 29, 2000) at 2-6; NRC Staff Response to the Atomic Safety and Licensing Board's Request for Additional Information (Mar. 29, 2000) at 2-5; *see also* CP&L Reply to Parties' Responses Regarding Relevance of Staff's Draft Decommissioning Study (Apr. 5, 2000) at 2-3; NRC Staff's Reply to [BCOC] Response to the Board's Request for Additional Information (Apr. 5, 2000) at 2-5.

Thereafter, by order dated May 5, 2000, the Board again requested information from the parties in connection with the draft Staff report, prompted by an April 13, 2000 public record letter from Advisory Committee on Reactor Safeguards (ACRS) Chairman Dana A. Powers to NRC Chairman Richard A. Meserve providing ACRS views on the draft Staff report, including concerns about the potential for exothermic reactions in the event a pool is drained and the resulting release of ruthenium, as a source term element. *See* Licensing Board Memorandum and Order (Requesting Additional Information) (May 5, 2000) at 1-2 (unpublished). In its May 15, 2000 response, BCOC found this letter

reinforced its contention EC-1 claim that spent fuel pool accident risks are greater than the Staff assumes because the Staff does not understand the potential for SFP exothermic reactions. *See* [BCOC] Response to May 5, 2000, Memorandum and Order (Requesting Additional Information) (May 15, 2000) at 1-4. In their May 15 responses, CP&L and the Staff maintained that, like the Staff draft report, the ACRS letter is irrelevant because it deals with a decommissioned facility, not an operating reactor like Harris. *See* [CP&L] Response to Board's Request Regarding Relevance of ACRS Letter Addressing NRC Staff Draft Decommissioning Study (May 15, 2000) at 1-3; NRC Staff Response to the Atomic Safety and Licensing Board's Second Request for Additional Information (May 15, 2000) at 2-3; *see also* [CP&L] Reply to Parties' Responses Regarding Relevance of ACRS Letter Addressing NRC Staff Draft Decommissioning Report (May 22, 2000) at 2-5; NRC Staff Reply to [BCOC] Response to May 5, 2000, Memorandum and Order (Requesting Additional Information) (May 22, 2000) at 1-2.

Finally, in response to a July 12, 2000 BCOC motion, on July 13, 2000, the Board granted leave for the parties to comment on a June 20, 2000 letter from ACRS Chairman Powers to NRC Chairman Meserve concerning the proposed resolution of outstanding Generic Safety Issue (GSI)-173A, regarding an action plan for resolving issues relating to operating reactor SFPs. *See* Licensing Board Memorandum and Order (Granting Motion for Leave to Comment) (July 13, 2000) at 1-2 (unpublished). BCOC took the position that, as with the ACRS comments on the Staff decommissioning study, this letter was relevant to its accident risk contention, particularly as it concerns SFP radiological inventories and release characteristics. *See* [BCOC] Comments on Relevance of June 20, 2000, ACRS Letter with Respect to Pending Environmental Contentions (July 20, 2000) at 3-4. In their comments on the ACRS letter, both CP&L and the Staff asserted that this ACRS letter had no relevance to the BCOC contentions because, as with the previous ACRS letter, it does not concern that specific beyond-design-basis reactor accident scenario that is the underpinning for the BCOC accident risk contention. *See* [CP&L] Comments on Relevance of June ACRS Letter to Pending Environmental Contentions (July 20, 2000) at 3-8; NRC Staff Comments on [ACRS] Letter of June 20, 2000 (July 20, 2000) at 2-3; *see also* [CP&L] Reply to Parties' Comments on Relevance of June ACRS Letter to Pending Environmental Contentions (July 27, 2000) at 2-4.

II. ANALYSIS

All the parties recognize that the five late-filing factors set forth in 10 C.F.R. § 2.714(a)(1) are applicable to BCOC's four pending environmental contentions. And, relative to such late-filed contentions, it is well established that the burden rests with the petitioner, here BCOC, to address affirmatively all five factors

and demonstrate that, on balance, they warrant excusing the lateness of the filing. Moreover, even if a late-filed contention fulfills the section 2.714(a)(1) requirements, it must still satisfy the admissibility standards set forth in section 2.714(b)(2)(i)-(iii), (d)(2), in order to receive merits consideration. *See, e.g., Private Fuel Storage, L.L.C.* (Independent Spent Fuel Storage Installation), LBP-99-43, 50 NRC 306, 312 (1999) (citing cases), *petition for interlocutory review denied*, CLI-00-2, 51 NRC 77 (2000).

A. Application of 10 C.F.R. § 2.714(a)(1) Late-Filing Criteria

It is, of course, also well established that the first factor — whether there is “good cause” for the failure to file on time — is the most important component in the late-filed balancing equation. The BCOC environmental contentions now at issue were not filed until some 9 months after contentions were due in this proceeding. Nonetheless, section 2.714(b)(2)(iii) recognizes that a petitioner can file amended or new contentions “if there are data or conclusions in the NRC draft or final environmental impact statement, environmental assessment, or any supplements relating thereto, that differ significantly from the data or conclusions in the applicant’s [environmental report].” Here, the crux of BCOC’s concerns, as expressed in its January 2000 contentions, is that the Staff erred in its December 1999 EA in concluding that no EIS is needed. As both CP&L and the Staff acknowledge, there is good cause for such a “late-filed” challenge, assuming the contentions involved are filed within a reasonable time after BCOC became, or should have become, aware of the Staff EA.

In this instance, BCOC’s late-filed contentions pleading was submitted some 45 days after the EA was first provided to BCOC counsel by fax from the Staff. BCOC declares that this period for filing was reasonable given that BCOC counsel (1) until January 4, 2000, was involved in preparing its 10 C.F.R. § 2.1113 written presentation regarding the two admitted technical contentions; (2) between January 8 and January 17, was on previously scheduled, 10-day overseas nonvacation trip; (3) between January 17 and January 21, was involved in preparing for and participating in the oral argument regarding that filing, which was held during an all-day session on January 21, 2000; and (4) between January 24 and January 31, was working on two other cases, and was out of her Washington, D.C. office on 1 day and was unable to reach her client on 2 days because of inclement weather. *See* BCOC Contentions Request at 23-25. Neither CP&L nor the Staff disputes that, under the circumstances, the “good cause” element of the section 2.714(a)(1) test has been fulfilled such that this factor favors admitting the contentions. We agree, and thus place this central factor on the “acceptance” side of the balance.

Relative to the other four factors, we also agree with the parties that factors two and four — availability of other means to protect petitioner’s interests and extent

of representation of petitioner's interests by other parties — weigh in BCOC's favor. As to factors three and five, which among the four non-good cause elements are given more weight in the balancing process, *see Commonwealth Edison Co.* (Braidwood Nuclear Power Station, Units 1 and 2), CLI-86-8, 23 NRC 241, 244-45 (1986), both are problematic in terms of their impact on the balance. Given our May 2000 ruling in favor of CP&L on the two technical issues we admitted for merits consideration, *see* LBP-00-12, 51 NRC 247, *petition for review denied as interlocutory*, CLI-00-11, 51 NRC 297 (2000), the admission of any of these environmental contentions undoubtedly will broaden the issues and delay the proceeding. Moreover, relative to element three — assistance in developing a sound record — our observation in our May 2000 decision that Dr. Thompson's expertise on reactor technical issues appeared to be "largely policy-oriented rather than operational" does not render this a compelling element on BCOC's side of the balance. Nonetheless, in the circumstances here, these two negative elements are not sufficient to overcome the combined weight of factors one, two, and four as supporting a finding that the late-filing of these contentions does not bar their admission.

B. Application of 10 C.F.R. § 2.714(b), (d) Admissibility Criteria

In determining whether the four BCOC environmental contentions are admissible in accordance with the standards set forth in section 2.714(b) and (d), we note initially that we previously dismissed contentions denominated as EC-1 through EC-5 in our July 1999 ruling on BCOC's standing and the admissibility of its timely filed contentions. Three of the four BCOC late-filed contentions essentially track these issues, albeit with different numbers in two instances.¹ For the sake of clarity, in considering these four late-filed contentions we have renumbered them to continue the numbering sequence begun with the already-rejected environmental contentions. And below, we discuss the admissibility of each, beginning with renumbered contention EC-6.

1. CONTENTION EC-[6]: Environmental Impact Statement Required

In the Environmental Assessment ("EA") for CP&L's December 23, 1998, license amendment application, the NRC Staff concludes that the proposed expansion of spent fuel storage capacity at the Shearon Harris nuclear power plant will not have a significant effect on the quality of the human environment. Environmental Assessment and Finding of No Significant Impact Related to Expanding the Spent Fuel Pool Stage Capacity at the Shearon Harris Nuclear Power Plant (TAC No. MA4432) at 10 (December 15, 2000). Therefore, the Staff has decided not to prepare an Environmental Impact Statement ("EIS") for the

¹Originally-filed contention EC-2 corresponds to late-filed contention EC-1 and the previously submitted contention EC-5 corresponds to late-filed contention EC-4.

proposed license amendment. The Staff's decision not to prepare an EIS violates the National Environmental Policy Act ("NEPA") and NRC's implementing regulations, because the Finding of No Significant Impact ("FONSI") is erroneous and arbitrary and capricious. In fact, the proposed expansion of spent fuel pool storage capacity at Harris would create accident risks that are significantly in excess of the risks identified in the EA, and significantly in excess of accident risks previously evaluated by the NRC Staff in the EIS for the Harris operating license. These accident risks would significantly affect the quality of the human environment, and therefore must be addressed in an EIS.

There are two respects in which the proposed license amendment would significantly increase the risk of an accident at Harris:

(1) CP&L proposes several substantial changes in the physical characteristics and mode of operation of the Harris plant. The effects of these changes on the accident risk posed by the Harris plant have not been accounted for in the Staff's EA. The changes would significantly increase, above present levels, the probability and consequences of potential accidents at the Harris plant.

(2) During the period since the publication in 1979 of NUREG-0575, the NRC's Generic Environmental Impact Statement ("GEIS") on spent fuel storage¹, new information has become available regarding the risks of storing spent fuel in pools. This information shows that the proposed license amendment would significantly increase the probability and consequences of potential accidents at the Harris plant, above the levels indicated in the GEIS, the 1983 EIS for the Harris operating license, and the EA. The new information is not addressed in the EA or the 1983 EIS for the Harris operating license.

Accordingly, the Staff must prepare an EIS that fully considers the environmental impacts of the proposed license amendment, including its effects on the probability and consequences of accidents at the Harris plant. As required by NEPA and Commission policy, the EIS should also examine the costs and benefits of the proposed action in comparison to various alternatives, including Severe Accident Mitigation Design Alternatives ("SAMDA's") and the alternative of dry storage.

¹ NUREG-0575, Generic Environmental Impact Statement on Handling and Storage of Spent Light Water Power Reactor Fuel (August 1979) (hereinafter "GEIS").

BCOC Contentions Request at 1-2.

DISCUSSION: *Id.* at 1-16; CP&L Contentions Response at 7-20; Staff Contentions Response at 7-26; BCOB Contentions Reply at 8-19.

RULING: With this contention, BCOB challenges the Staff's EA conclusion that the proposed CP&L license amendment to use spent fuel pools C and D does not require a complete EIS. In assessing the basis for this contention, we note that all three parties agree that the standard for requiring that an EIS be prepared is whether the action at issue, in this case the CP&L license amendment, is a major federal action having a significant impact on the human environment. *See* BCOB Contentions Request at 3; CP&L Contentions Response at 3 n.3; Staff Contentions Response at 8. Further, all the parties agree that the agency is not required to address in an EIS consequences of an action that are "remote

and speculative.” See CP&L Contentions Response at 9-10; Staff Contentions Response at 16; BCOC Contentions Reply at 8. What the parties disagree about is whether a possible consequence of the action identified by BCOC — a severe accident in spent fuel pools C and D — is remote and speculative.

BCOC discusses a number of different elements that it asserts provide the basis for this contention, including the fact that the number of stored spent fuel assemblies at the Harris facility ultimately may double as a result of the proposed amendment; the purported impact of the use of “administrative measures” such as controlling fuel burnup levels rather than relying solely on “physical measures” such as fuel assembly separation and the presence of solid neutron absorbers to avoid criticality; and new information regarding sabotage risk. In the Board’s view, however, the crux of the contention, and the focus of our consideration as to whether it meets the specificity and basis requirements of section 2.714, is whether the accident proposed by BCOC in basis F.1 of the contention has a probability sufficient to provide the beyond-remote-and-speculative “trigger” that is needed to compel preparation of an EIS relative to this proposed licensing action.

To examine whether the contention provides an adequate basis to support further Board consideration of this question, we examine the accident scenario in question, which was first summarized by CP&L, see CP&L Contentions Response at 9-10, with an appropriate modification by BCOC, see BCOC Contentions Reply at 8. In this regard, BCOC postulates the following chain of events:

- (1) a degraded core accident;
- (2) containment failure or bypass;
- (3) loss of all spent fuel cooling and makeup systems;
- (4) extreme radiation doses precluding personnel access;
- (5) inability to restart any pool cooling or makeup systems due to extreme radiation doses;
- (6) loss of most or all pool water through evaporation; and
- (7) initiation of an exothermic oxidation reaction in pools C and D.

Relative to this accident sequence, what BCOC asserts, and what the CP&L and the Staff contest, is that BCOC has established an adequate basis to allow merits litigation on whether this sequence is not “remote and speculative” so that a further environmental analysis of the CP&L pool expansion amendment request is required.

In considering this question, we note that the Commission has provided some guidance regarding such an issue statement in its decision in *Vermont Yankee Nuclear Power Corp.* (Vermont Yankee Nuclear Power Station), CLI-90-4, 31 NRC 333 (1990). In that case, which also involved the expansion of a spent fuel pool, likewise at issue was the admission of a contention that asserted the license amendment involved required the preparation of an environmental impact statement because the action raised the potential for a substantial release of

radioactive material following the occurrence of a specific accident sequence. More specifically, the question in dispute was whether the accident sequence specified was of a sufficiently high probability to put it beyond the “remote and speculative” threshold for the purpose of admitting the contention.

Prior to coming before the Commission, however, that contention was considered by both the Licensing Board and the Appeal Board, with the matter coming before the Appeal Board on referral from the Licensing Board’s admission of the contention. *See Vermont Yankee Nuclear Power Corp.* (Vermont Yankee Nuclear Power Station), ALAB-919, 30 NRC 29 (1989). The Appeal Board determined that:

The essence of Environmental Contention 1 . . . is that an environmental impact statement is required for the proposed license amendment to assess the risks of the following hypothetical accident scenario: (1) a severe reactor accident occurs by some unidentified mechanism and involves substantial fuel damage, hydrogen generation, Mark I containment failure, and subsequent detonation in the reactor building where the Vermont Yankee fuel pool is located; (2) the reactor building and the spent fuel pool are assuredly not likely to withstand the pressure and temperature loads generated by such an accident, thereby threatening the pool cooling systems or the pool structure itself . . . ; and (3) pool heatup occurs, resulting in a self-sustaining zircaloy cladding fire with increased long-term health effects for the public from the increased fuel pool inventory.

Id. at 43 (citations omitted). The Appeal Board then went on to say that the scenario on which the contention is premised “is obviously not a ‘normal’ operating event; indeed it can be fairly characterized as a double ‘worst case’ accident.” *Id.* Consequently, after what it considered to be a careful examination of the bases presented for the accident scenario, the Appeal Board rejected the contention and referred its ruling to the Commission. *See id.* at 52.

The Commission responded by remanding the issue to the Appeal Board for further consideration, saying:

The Commission believes that on remand more information on the plausibility or probability of the reactor accident/hydrogen combustion/spent fuel pool cooling failure/cladding fire at issue here . . . is needed before a judgment should be made whether the accident . . . is remote and speculative. As part of our remand we therefore direct the Appeal Board to develop such information further. We leave it to the Appeal Board to decide on the procedural means to obtain this information, whether by inviting something akin to summary disposition motions or otherwise. If the Appeal Board finds that an accident probability on the order of 10^{-4} per reactor year is appropriate for the entire accident sequence postulated in this contention, the case should be returned to the Commission for further review. Otherwise, the Appeal Board should modify or confirm its judgment as to the remote and speculative nature of the accident on the basis of the accident probability derived on remand.

Vermont Yankee, CLI-90-4, 31 NRC at 335-36 (citations omitted).

There followed an Appeal Board request for clarification of the Commission's decision. See *Vermont Yankee Nuclear Power Corp.* (Vermont Yankee Nuclear Power Station), ALAB-938, 32 NRC 154 (1990). But before the Commission could respond, the intervenors asked to withdraw from the proceeding and the licensee moved to dismiss the proceeding. The Commission granted the motion to dismiss, but opined that it was

concerned that the probability that the Appeal Board found to be so low as to be remote and speculative pertained not to the whole scenario in the contention but to pieces of the scenario in the contention or related scenarios set out in the technical documents, some with probabilities as high as on the order of 10^{-4} per reactor year. In ALAB-919, the Appeal Board bridged the gap between the technical documents and the scenario in the contention by assuming, conservatively, that the probability of that scenario could be no *greater* than certain scenarios actually analyzed in the documents. If the scenarios in the documents were remote and speculative, then, *a fortiori*, the scenario in the contention must be remote and speculative as well. Our opinion makes clear that future decisions that accident scenarios are remote and speculative must be more specific and more soundly based on the actual probabilities and accident scenarios being analyzed.

Vermont Yankee Nuclear Power Corp. (Vermont Yankee Nuclear Power Station), CLI-90-7, 32 NRC 129, 132 (footnote omitted).

Certainly, in the intervening decade the Commission has come to rely on probabilistic analysis ever more heavily in the process of making decisions. Indeed, the entire trend in licensing, enforcement, inspection, and the granting of amendments has swung gradually toward decision-making by probabilistic risk assessment. We therefore think that the Commission's intent is at present even more firmly directed to deciding what is "remote and speculative" by examining the probabilities inherent in a proposed accident scenario.

In this instance, based on the information now presented by BCOC, including the 1993 Harris facility individual plant evaluation (IPE) of core damage frequency, the accident scenario it has postulated may have a probability in the range of 1×10^{-5} per reactor year, see BCOC Contentions Reply at 11-12, a figure that under the Commission's guidance seemingly should not be dismissed automatically as per se "remote and speculative." To be sure, CP&L and the Staff dispute various aspects of the BCOC probability analysis and its underlying accident scenario, including whether cooling water restoration would be precluded by onsite radiation levels; the availability of water makeup systems; bounding decay heat levels for pools C and D; the age of the spent fuel that will be stored in pools C and D; whether the probability of a substantial SFP release is on a par with the probability of a substantial reactor release; the effect of the use of burnup credit; and an increase in sabotage-related risk. And we agree with CP&L and the Staff that BCOC's assertions regarding sabotage risk do not provide a litigable basis for this contention. See *Philadelphia Electric Co.* (Limerick Generating Station, Units 1 and 2), ALAB-819, 22 NRC 681, 701 (1985), *review declined*,

CLI-86-5, 23 NRC 125 (1986), *aff'd*, *Limerick Ecology Action v. NRC*, 869 F.2d 719, 744 (3d Cir. 1989). We find, however, that the information provided by BCOC otherwise is sufficient to establish a genuine material dispute of fact or law adequate to warrant further inquiry relative to the other aspects of the BCOC scenario and the associated probability analysis.² Accordingly, we admit contention EC-6 as it relates to this accident sequence.³

Finally, in connection with further litigation on this contention, we offer the following additional observations. In its *Vermont Yankee* decision, the Commission directed the Appeal Board to select a “procedural means” to obtain the risk-informed information and suggested “something akin” to inviting summary disposition motions. CLI-90-4, 31 NRC at 336. In this instance, pursuant to 10 C.F.R. § 2.1109, CP&L has invoked the process set forth in Subpart K to Part 2 that includes the written summaries and oral argument specified in sections 2.1109 and 2.1113. Certainly, these procedures are sufficiently “akin” to summary disposition to satisfy the Commission’s previously stated preference.

Additionally, so that we will be able properly to assess the significance of the materials submitted in the detailed written summaries required by section 2.1113(a), we ask that the parties address the following points:

1. What is the submitting party’s best estimate of the overall probability of the sequence set forth in the chain of seven events in the CP&L and BCOC’s filings, set forth on p. 95, *supra*? The estimates should utilize plant-specific data where available and should utilize the best available generic data where generic data are relied upon.
2. The parties should take careful note of any recent developments in the estimation of the probabilities of the individual events in the sequence at issue. In particular, have new data or models suggested any modification of the estimate of 2×10^{-6} per year set forth in the executive summary of NUREG-1353, *Regulatory Analysis for the Resolution of Generic Issue 82, Beyond Design Basis Accidents in Spent Fuel Pools (1989)*? Further, do any of the concerns expressed in the ACRS’s April 13, 2000 letter suggest that the probabilities of individual elements of the sequence are greater than those previously analyzed (e.g., is the chance of occurrence of sequence element seven, an exothermic reaction, greater than was assumed in the decade-old NUREG-1353)?
3. Assuming the Board should decide that the probability involved is of sufficient moment so as not to permit the postulated accident sequence to be classified as “remote and

²In this regard, we note that in our decision in LBP-00-12, 51 NRC at 259-60, in ruling on the two admitted BCOC technical contentions, we found CP&L’s planned use of so-called “administrative processes,” such as use of enrichment/burnup level controls and soluble boron as SFP criticality control measures, is permitted under General Design Criteria (GDC) 62. As a consequence, contrary to BCOC’s assertion, the use of such measures does not, in and of itself, trigger the need for an EIS. Whether, and to what extent, the use of these control measures has any relevance to the probability calculation at issue here is a matter for resolution as part of further litigation regarding contention EC-6. The same is true for the question of the heat load for pools C and D, which seemingly includes an associated legal issue concerning appropriate project segmentation relative to NEPA.

³In its final sentence, the contention includes a statement about what should be analyzed in an EIS. For the reasons stated below relative to contentions EC-7 and EC-8, we consider this aspect of the contention premature and do not admit it.

speculative,” what would be the overall scope of the environmental impact analysis the Staff would be required to prepare (i.e, limited to the impacts of that accident sequence or a full blown EIS regarding the amendment request)?

2. *Contention EC-[7]: EIS Should Consider Cumulative Impacts in Light of New Information*

The EA is deficient because it fails to acknowledge or evaluate the significant cumulative environmental risk posed by the operation of pools A, B, C, and D.

BCOC Contentions Request at 16.

DISCUSSION: *Id.* at 17-18; CP&L Contentions Response at 20-25; Staff Contentions Response at 26-27; BCOC Contentions Reply at 20-21.

RULING: We find this contention premature, given that there is still an outstanding question whether the Staff correctly concluded in its EA that no environmental impact statement is required. *See* LBP-99-25, 50 NRC at 39. If, in ruling on the merits of contention EC-6, we should determine that an EIS is necessary, then the proper scope of that EIS would become a matter in controversy based on the CP&L environmental report (assuming the Staff requires that one be prepared) and the EIS the Staff prepares.

3. *Contention EC-[8]: Scope of EIS Should Include Brunswick and Robinson Storage*

The EIS for the proposed license amendment should include within its scope the storage of spent fuel from the Brunswick and Robinson nuclear power plants.

BCOC Contentions Request at 18.

DISCUSSION: *Id.* at 18-19; CP&L Contentions Response at 25-28; Staff Contentions Response at 27-28; BCOC Contentions Reply at 21.

RULING: As with contention EC-7, we decline to admit this contention as premature.

4. *Contention EC-[9]: Discretionary EIS Warranted*

Even if the Licensing Board determines that an EIS is not required under NEPA and 10 C.F.R. § 51.20(a), the Board should nevertheless require an EIS as an exercise of its discretion, as permitted by 10 C.F.R. §§ 51.20(b)(14) and 51.22(b).

BCOC Contentions Request at 20.

DISCUSSION: *Id.* at 20-23; CP&L Contentions Response at 28-30; Staff Contentions Response at 28-29; BCOC Contentions Reply at 21-22.

RULING: We have carefully considered whether such a discretionary EIS is warranted and we see no reason to require an EIS if one is not required by the rules. We recognize that CP&L and the Staff assert that such a requirement is ultra vires for this Board. See CP&L Contentions Response at 28; Staff Contentions Response at 28. We, however, need not rule on that point. Suffice it to say that we find no “special circumstances” pursuant to sections 51.20(b)(14) and 51.22(b) that would warrant a discretionary EIS.

III. ADMINISTRATIVE MATTERS

As we previously noted, under 10 C.F.R. § 2.1109, CP&L has invoked the procedural provisions of Part 2, Subpart K, relative to the litigation of this proceeding. Accordingly, the schedule for utilizing the Subpart K procedures in connection with contention EC-5 is as follows:

Discovery Begins	Monday, August 21, 2000
Discovery Ends	Friday, October 20, 2000
Written Summaries Filed	Monday, November 20, 2000

The discovery limitations and guidelines set forth in our July 29, 1999 issuance shall apply.⁴ See Licensing Board Memorandum and Order (Granting Request to Invoke 10 C.F.R. Part 2, Subpart K Procedures and Establishing Schedule) (July 29, 2000) at 3-4. Moreover, the Board will establish a date and location for conducting oral argument regarding the parties’ written summaries in a subsequent order.

IV. CONCLUSION

With these new proposed environmental contentions being filed within 45 days of the challenged Staff EA, the five-factor balancing test set forth in 10 C.F.R. § 2.714(a)(1) favors the admission of BCOC renumbered late-filed contentions EC-6 through EC-8. Additionally, we find that BCOC has established relative to contention EC-6 regarding “remote and speculative” SFP accident sequences

⁴As with the admitted technical contentions, the Board is not requiring that informal discovery must be used during the discovery period. Nonetheless, the Board notes that the parties need not await the beginning of the discovery period to initiate discussions regarding the nature and scope of the information each will be seeking in discovery and try to reach some agreement on documentary or other materials that can be provided without a formal discovery request.

Also, in connection with discovery in this proceeding, the Board notes that any attempt to obtain discovery materials or testimony from ACRS members, Staff, or consultants is subject to the exceptional circumstances showing of 10 C.F.R. § 2.720(h). See *Pacific Gas and Electric Co.* (Diablo Canyon Nuclear Power Plant, Units 1 and 2), ALAB-519, 9 NRC 42, 43 n.2 (1979). Moreover, the Board directs that any discovery requests regarding ACRS information or personnel must be filed within the first 10 days of the discovery period established above.

that there exists a genuine material dispute of fact or law adequate to warrant further inquiry. We thus admit contention EC-6 and establish a schedule for its further litigation under 10 C.F.R. Part 2, Subpart K. On the other hand, we dismiss contentions EC-7 and EC-8, which concern the scope of any Staff EIS that may be needed, as premature, and dismiss contention EC-9, which concerns the need for a discretionary EIS, as lacking adequate support to show there exists a genuine material dispute of fact or law adequate to warrant further inquiry.

For the foregoing reasons, it is, this seventh day of August 2000, ORDERED that:

1. The following BCOC contention is *admitted* for litigation in this proceeding: EC-6.
2. The following BCOC contentions are rejected as inadmissible for litigation in this proceeding: EC-7, EC-8, and EC-9.
3. The parties are to conduct discovery and submit section 2.1113 written presentations in accordance with the schedule established in section III above.

THE ATOMIC SAFETY AND
LICENSING BOARD⁵

G. Paul Bollwerk, III
ADMINISTRATIVE JUDGE

Frederick J. Shon
ADMINISTRATIVE JUDGE

Dr. Peter S. Lam
ADMINISTRATIVE JUDGE

Rockville, Maryland
August 7, 2000

⁵Copies of this Memorandum and Order were sent this date by Internet e-mail transmission to counsel for (1) Applicant CP&L; (2) Intervenor BCOC; and (3) the Staff.

UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

ATOMIC SAFETY AND LICENSING BOARD

Before Administrative Judges:

Charles Bechhoefer, Presiding Officer
Frederick J. Shon, Special Assistant

In the Matter of

Docket No. 40-3453-MLA-4
(ASLBP No. 99-763-05-MLA)
(Amendment of License
Condition (LC) 55B(2),
Source Material
License No. SUA-17)

MOAB MILL RECLAMATION
TRUST (formerly ATLAS
CORPORATION)
(Moab, Utah Facility)

In the Matter of

Docket No. 40-3453-MLA-5
(ASLBP No. 00-781-07-MLA)
(Amendment of License
Condition (LC) 55B(2),
Source Material
License No. SUA-17)

MOAB MILL RECLAMATION
TRUST
(Moab, Utah Facility)

August 10, 2000

The Presiding Officer grants a request for a hearing in a license-amendment proceeding (MLA-5), consolidates the proceeding with another license-amendment

proceeding (MLA-4) involving similar parties and issues, and requests comments on potential consolidation with another license-amendment proceeding (MLA-3) involving certain related issues but to some extent differing parties.

MEMORANDUM AND ORDER
(Granting Request for Hearing and Consolidating Proceedings)

Pending before me are two proceedings, each involving a proposed amendment to Source Material License SUA-17. The first, involving a December 22, 1998 amendment request that was noticed on January 19, 1999, 64 Fed. Reg. 2,919 (MLA-4), would have changed the date for projected completion of groundwater corrective actions at the site of the former Atlas Corporation uranium mill in Moab, Utah, from December 31, 1998, to July 31, 2006.¹ The second, involving a March 31, 2000 proposed amendment that was noticed for hearing on April 17, 2000, 65 Fed. Reg. 20,490 (MLA-5), would further change various dates respecting remedial corrective actions, including the date for completion of groundwater corrective actions to July 31, 2008. Both proceedings are governed by the Commission's informal hearing procedures set forth in 10 C.F.R. Part 2, Subpart L (§§ 2.1201-2.1263).

The only Intervenor in the MLA-4 proceeding is Ms. Sarah M. Fields, of Moab, Utah. In my Memorandum and Order (Granting Request for Hearing and Posing Questions re: Suspension of Proceeding), dated May 14, 1999, I determined that Ms. Fields had standing and had proffered an area of concern germane to that proceeding. Accordingly, I granted her request for a hearing.

Ms. Fields is also the only person who responded to the Notice of Opportunity for Hearing in the MLA-5 proceeding. Her petition, titled "First Supplement to Petitioner's February 18, 1999, Request for a Hearing," was dated May 17, 2000, and was timely filed under the *Federal Register* notice for that proceeding.² Her statement of interest is similar to that she advanced in the MLA-4 proceeding. Likewise, her areas of concern encompass those advanced in the MLA-4 proceeding, although they are somewhat broader in that they reflect the greater number of dates sought to be changed in the MLA-5 proceeding.

Ms. Fields' May 17, 2000 pleading seeks, in the alternative, two different methods of litigating the concerns she has put forward. First, Ms. Fields seeks to

¹The December 1998 amendment request was noticed under the name of Atlas Corporation. As a consequence of the bankruptcy of Atlas Corporation, the license in question was subsequently transferred to the Moab Mill Reclamation Trust (with PricewaterhouseCoopers LLP as Trustee). See Staff Order of December 27, 1999, issued by the Director, NMSS; LBP-00-4, 51 NRC 53, 54 (2000).

²On May 25, 2000, Ms. Fields filed an "Errata" to her "First Supplement," correcting various typographical errors in the "First Supplement." In considering her petition in the MLA-5 proceeding, I will consider the "First Supplement" as corrected by the "Errata."

supplement her earlier MLA-4 filings with material related to the March 31, 2000 amendment. Alternatively, she explicitly seeks a separate hearing on the matters raised in the March 31, 2000 amendment request.

In response, the Staff, in a filing dated June 6, 2000, agreed both that the March 31, 2000 amendment is sufficiently related to the original MLA-4 hearing request to warrant inclusion in the MLA-4 proceeding and that the supplement sets forth appropriate areas of concern for the MLA-5 amendment proceeding.³ The Trustee on June 13, 2000, took a similar position.⁴

I find that the best means to permit Ms. Fields to litigate the issues in the MLA-5 proceeding is to grant that part of her May 17, 2000 filing that is in effect a request for a hearing in the MLA-5 proceeding, and then to consolidate the MLA-4 and MLA-5 proceedings (inasmuch as the areas of concern in the MLA-4 proceeding are encompassed by those in the MLA-5 proceeding). Ms. Fields has demonstrated standing in the MLA-5 proceeding and she has proffered areas of concern germane to that proceeding. Accordingly, her request is hereby *granted*. I will issue a Notice of Hearing in the near future.⁵

As for consolidation of the MLA-4 and MLA-5 proceedings, I telephoned Ms. Fields, as well as counsel for the Trustee and for the NRC Staff. None had any objection to consolidation — indeed, Ms. Fields expressly favored it. Therefore, I am hereby *consolidating* the two proceedings.

Another related proceeding — designated as MLA-3 — is also ongoing, and is before another Administrative Judge (Judge Thomas S. Moore) as Presiding Officer. (Judge Frederick J. Shon has been named Special Assistant in all three proceedings.) Consolidation of MLA-4/5 with MLA-3 is an action that raises several different issues, based in part on the more advanced progress of that case and the circumstance that Ms. Fields is not a party to that proceeding and has never sought to become one. Written comments on the desirability of consolidating MLA-4/5 with MLA-3 are invited, to be received by me by close-of-business September 1, 2000. Thereafter, at a date and time to be announced, I plan to hold a telephone conference, to include the Presiding Officer, Judge Shon, and parties to this proceeding, as well as Judge Moore, Presiding Officer in the MLA-3 proceeding, and parties to that proceeding.

In the MLA-4 proceeding, on March 4, 2000, Ms. Fields filed a pleading titled “Petitioner’s Request That Hearing No Longer Be Held in *De Facto* Abeyance and Petitioner’s Request for Summary Disposition.” On March 18, 2000, Ms.

³ Nuclear Regulatory Commission Staff’s Response to First Supplement to Petitioner’s February 18, 1999 Request for a Hearing.

⁴ Moab Mill Reclamation Trustee’s Response to First Supplement to Petitioner’s February 18, 1999 Request for a Hearing.

⁵ By letter dated July 17, 2000, the NRC Staff advised, pursuant to 10 C.F.R. § 2.1213, that it wishes to participate in the MLA-5 proceeding. The Staff thus becomes a party to the MLA-5 proceeding, along with Ms. Fields and the Trustee.

Fields filed a Supplement to that request. In a March 28, 2000 telephone conference involving all parties, as well as the Presiding Officer (in MLA-4) and Special Assistant, memorialized by a Memorandum and Order (Telephone Conference, 3/28/00), dated March 29, 2000, I was advised of a settlement proposal in a related case in the United States District Court for the District of Utah, brought by the Grand Canyon Trust et al. (Intervenors in the MLA-3 proceeding) against the NRC, the United States Interior Department, and the United States Fish & Wildlife Service that, if approved, would render Ms. Fields' claims moot as a practical matter, given the limited funds available as a result of the bankruptcy of Atlas Corporation. The MLA-4 proceeding continued to be held in abeyance pending a report to be submitted by the last business day of April. On May 1, 2000, the Trustee submitted such a report, advising that the settlement in MLA-3 was still under consideration. Taking into account dates specified in the MLA-5 proceeding, the Trustee requested that the dates for responses to Ms. Fields' March 4, 2000 motion continue to be deferred, pending outcome of the settlement negotiations before the United States District Court. Thus far, I have not prescribed new response dates to Ms. Fields' motion.

On June 2, 2000, Ms. Fields filed a "Second Supplement to Petitioner's February 18, 1999, Request for a Hearing," that provides additional information concerning negotiations with respect to proper remediation dates and seeks to have appropriate remediation dates established. In response to her request for a hearing in the MLA-5 proceeding, however, the NRC Staff and Trustee each seek to have the MLA-5 proceeding (now consolidated with the MLA-4 proceeding) continue to be held in abeyance.

With respect to the joint conference call referenced earlier, the Presiding Officer in the MLA-4/5 proceeding wishes to discuss with the parties to this proceeding whether responses to Ms. Fields' March 4, 2000 motion in MLA-4 (equally applicable to MLA-5) should be scheduled.

* * * *

For the reasons stated, it is, this 10th day of August 2000, ORDERED:

1. The request for a hearing of Ms. Sarah M. Fields, of Moab, Utah, in the MLA-5 proceeding is hereby *granted*. Ms. Fields thus becomes a party to the MLA-5 proceeding.
2. The MLA-4 and MLA-5 proceedings are hereby *consolidated*.
3. Parties to the consolidated MLA-4/5 proceeding are to advise me in writing, by close of business September 1, 2000, whether further consolidation with the MLA-3 proceeding is warranted or useful.
4. A joint telephone conference with the Presiding Officer and parties to the MLA-3 proceeding is hereby scheduled, at a date and time to be determined by a later order. During this conference, parties to the MLA-4/5 proceeding should be prepared to discuss whether actions in these consolidated proceedings should

continue to be deferred or whether response dates with respect to Ms. Fields' March 4, 2000 motion should be established.

Charles Bechhoefer, Presiding Officer
ADMINISTRATIVE JUDGE

Rockville, Maryland
August 10, 2000

UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

ATOMIC SAFETY AND LICENSING BOARD

Before Administrative Judges:

Ivan W. Smith, Presiding Officer
Thomas D. Murphy, Special Assistant

In the Matter of

Docket No. 40-6394-MLA
(ASLBP No. 00-777-05-MLA)

U.S. DEPARTMENT OF THE
ARMY
(Army Research Laboratory)

August 14, 2000

In a proceeding for an amendment to a materials license held by the U.S. Army in connection with its Aberdeen Proving Ground site, a hearing request by the Aberdeen Proving Ground Superfund Citizens Coalition was denied on the basis that it failed to establish requisite standing to intervene. The Presiding Officer allowed the Coalition an opportunity to amend its hearing request to establish this standing, but the Coalition failed to file an amendment during the prescribed time period.

MEMORANDUM AND ORDER
(Denying Request for Hearing)

Richard Ochs, President of the Aberdeen Proving Ground Superfund Citizens Coalition (Coalition), requested a hearing in this proceeding by telegram and letter dated May 1, 2000. His stated reason for requesting a hearing, in its entirety, is “We represent community interest, environment, and health. Our concern is dust.”

In a memorandum and order dated June 20, 2000, I noted several deficiencies in Mr. Ochs' request for a hearing. In particular, I noted that the address given for the Coalition, 2707 Woodsdale Avenue, Baltimore, Maryland, 21214 (presumably Mr. Ochs' address), appeared on maps to be about 20 miles from the nearest border of the Aberdeen Proving Ground. I ruled, therefore, that he lives too far from the study area to be personally entitled to a hearing. However, recognizing that there may be other members of the Coalition living closer to the study area whose interests may be affected by the results of the proceeding, I granted an extension of 30 days from the date of that order to file an amended request. More than 30 days have passed (July 20, 2000) and no papers have been filed on behalf of the Coalition. It appears that Mr. Ochs and the Coalition have abandoned their request for a hearing. The original deficiencies in the request for hearing dated May 1, 2000, remain uncorrected. Neither Mr. Ochs nor the Coalition has identified interests that may be affected by the outcome of the proceeding and neither is entitled to a hearing on this application.

The request for hearing is, therefore, *DENIED*.

This Memorandum and Order terminating this proceeding will constitute the final decision of the Commission forty (40) days from the date of its issuance, or on *Monday, September 25, 2000*, unless an appeal to the Commission is filed within ten (10) days of the service of this Order in accordance with 10 C.F.R. § 2.1205(o), or unless the Commission directs otherwise. Any interested party may support or oppose an appeal by filing a counter-statement within fifteen (15) days of the service of the requester's appeal brief.

It is so ORDERED.

BY THE PRESIDING OFFICER

Ivan W. Smith
ADMINISTRATIVE JUDGE

Rockville, Maryland
August 14, 2000

UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

ATOMIC SAFETY AND LICENSING BOARD

Before Administrative Judges:

Charles Bechhoefer, Chairman
G. Paul Bollwerk, III
Dr. Richard F. Cole

In the Matter of

Docket No. 030-20563
(ASLBP No. 00-779-01-CivP)
(License No. 52-21368-01)
(Order Imposing
Civil Monetary Penalty
(EA 99-262))

WESTERN SOIL, INC.
(Mayaguez, Puerto Rico)

August 29, 2000

In a civil penalty proceeding, the Atomic Safety and Licensing Board approves a settlement agreement between the NRC Staff and the Licensee and terminates the proceeding.

MEMORANDUM AND ORDER
(Approving Settlement Agreement and Terminating Proceeding)

On April 12, 2000, the NRC issued an Order Imposing Civil Monetary Penalty (Order) in Enforcement Action (EA) 99-262 against Western Soil, Inc. (Western Soil or Licensee). 65 Fed. Reg. 21,489 (2000). The Order was based on a Notice of Violation and Proposed Imposition of Civil Penalty (Notice) sent to Western Soil by letter dated November 24, 1999, asserting that Western Soil failed to secure from unauthorized removal or limit access to a moisture/density portable

nuclear gauge containing approximately 10 millicuries of cesium-137 and 50 millicuries of americium-241 in a vehicle while at a temporary job site. The notice also alleged that Western Soil did not control and maintain constant surveillance of this material, so that the material was stolen. Western Soil denied that it had failed to maintain adequate surveillance and also claimed that this was the first occasion that Western Soil or its owner/radiation safety officer had been involved in apparent violations of NRC regulations. The order imposed a \$2,750 monetary penalty for this Severity Level III violation. The order also advised Western Soil of its right to a hearing.

Western Soil did request such a hearing, and this Atomic Safety and Licensing Board was established on July 3, 2000, to preside at the hearing. 65 Fed. Reg. 42,398 (2000). By Memorandum and Order dated July 5, 2000 (unpublished), the Licensing Board granted Western Soil's request for a hearing and scheduled a telephone prehearing conference for August 3, 2000. The Board also requested the NRC Staff to provide it with copies of certain background documents prior to the prehearing conference. The Staff did so on July 14, 2000. At that time, the Staff also advised that it had reached a tentative settlement agreement with the Licensee and would submit such agreement for Board approval when it had been signed. On August 2, 2000, the Staff advised the Licensing Board, by telephone, that the agreement had been signed and would be forwarded to the Board in the near future. Therefore, on August 2, the Licensing Board issued a memorandum and order cancelling the August 3, 2000 prehearing conference call.

On August 24, 2000, the Staff submitted the settlement agreement to the Licensing Board, seeking approval of the agreement and termination of the proceeding. Under the agreement, Western Soil admitted the violation currently being contested. The agreement reduces the civil monetary penalty to \$500. Perhaps more significantly, the agreement also provides that, although the parties maintain their respective positions with regard to the applicability of a similar violation (EA 92-239) in 1992 by Caribbean Soil Testing Co., Inc., a previous owner of Western Soil,¹ the parties here agree that the previous violation "will not impact any enforcement action that the NRC may take with regard to any future violations that may be committed by Western Soil."

Under 10 C.F.R. § 2.203, the Staff is authorized to enter into a stipulation for the settlement of a proceeding or compromise of a civil penalty. Such compromise is subject to approval by this Licensing Board, "according due weight to the position of the staff." In submitting the instant joint settlement agreement to us

¹In its order, the Staff attributed the previous violation of the predecessor company to Western Soil. For its part, Western Soil sought to have the current violation considered as the first violation by the Licensee. The number of prior violations can impact the amount of the penalty, under the Commission's *General Statement of Policy and Procedure for NRC Enforcement Actions* (NUREG-1600, May 1, 2000), § VI.C, 65 Fed. Reg. 25,368, 25,379 (2000).

for approval, the Staff advises that it is in the public interest to terminate this proceeding without further litigation, subject to our approval of the agreement.

We have reviewed the settlement agreement submitted for our approval (a copy of which is attached) and, according due weight to the position of the Staff, find no reason to disagree with the parties' expressed resolution. Accordingly, we hereby *approve* the settlement agreement and *terminate* this proceeding.

IT IS SO ORDERED.

THE ATOMIC SAFETY AND
LICENSING BOARD

Charles Bechhoefer, Chairman
ADMINISTRATIVE JUDGE

G. Paul Bollwerk, III
CHIEF ADMINISTRATIVE JUDGE

Dr. Richard F. Cole
ADMINISTRATIVE JUDGE

Rockville, Maryland
August 29, 2000

UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

BEFORE THE ATOMIC SAFETY AND LICENSING BOARD

In the Matter of

**Docket No. 030-20563
(ASLBP No. 00-779-01-CivP)**

**WESTERN SOIL, INC.
(Mayaguez, Puerto Rico)**

SETTLEMENT AGREEMENT

The United States Nuclear Regulatory Commission (NRC) and Western Soil, Inc. (Western Soil), in consideration of the promises and representations contained in this document, hereby agree as follows:

1. On April 12, 2000, the NRC issued an Order Imposing Civil Monetary Penalty (Order) in Enforcement Action 99-262 (EA 99-262) with respect to an alleged violation by Western Soil. The Order asserted that, as described in a Notice of Violation and Proposed Imposition of Civil Penalty (Notice) sent to Western Soil by letter dated November 24, 1999, Western Soil failed to secure from unauthorized removal or limit access to a moisture/density portable nuclear gauge containing approximately 10 millicuries of cesium-137 and 50 millicuries of americium-241 in a vehicle while at a temporary job site which is an unrestricted area, nor did the licensee control and maintain constant surveillance of this licensed material. As a result, the gauge was stolen. The Order imposed a civil monetary penalty in the amount of \$2,750 on Western Soil for this Severity Level III violation.

2. On June 6, 2000, Western Soil requested an enforcement hearing in response to the Order entered in EA 99-262 in order to present to an Atomic Safety and Licensing Board (Board) testimony and evidence to contest the alleged violation and the Order as unjustified under the evidence and applicable regulations. In connection therewith, Western Soil denied that it had failed to maintain surveillance of the licensed material. Western Soil also maintained that this was the first time that Western Soil or its Owner/Radiation Safety Officer had been involved in apparent violations of NRC regulations.

3. As the result of a telephone conference held on July 10, 2000, Western Soil and the NRC have concluded that it is in the respective interests of Western

Soil, and the NRC as well as the public interest, to settle the dispute at issue in EA 99-262. Therefore, Western Soil and the NRC agree as follows:

A. The NRC Staff and Western Soil will jointly move the Board to approve this Settlement Agreement and to terminate this proceeding.

B. Western Soil admits that the violation in Part I of the Notice involving Western Soil's failure to secure from unauthorized removal or limit access to a moisture/density portable nuclear gauge containing licensed material and the failure to control and maintain constant surveillance of this licensed material occurred as stated in the Notice and restated in the Order.

C. The NRC agrees to reduce the amount of the civil monetary penalty imposed by the Order to \$500.

D. Within five (5) business days of approval of this Settlement Agreement by the Board, Western Soil agrees to pay \$500 civil monetary penalty. Such payment shall be made by check, draft, money order, or electronic transfer, payable to the Treasurer of the United States and shall be mailed to R.W. Borchardt, Director, Office of Enforcement, U.S. Nuclear Regulatory Commission, One White Flint North, 11555 Rockville, MD 20852-2738.

E. This Settlement Agreement constitutes final disposition of the matters giving rise to EA 99-262 and to this litigation. In consideration of the terms of this Agreement, the NRC Staff will assert no further enforcement claims, in any form or forum, related to the matters addressed in EA 99-262 and the underlying inspection report, and Western Soil will not pursue any further hearings on, or judicial review of, this matter.

4. The parties continue to maintain their respective positions with regard to whether this violation constituted the first violation by this licensee, or whether Western Soil was responsible for a similar violation which occurred when the license was under the control of the previous owner, Caribbean Soil Testing Company, Inc. However, the parties agree that the previous violation, cited as EA 92-239, will not impact any enforcement action that the NRC may take with regard to any future violations that may be committed by Western Soil.

IN WITNESS WHEREOF, Western Soil and the NRC have caused this Settlement Agreement to be executed by their duly authorized representatives.

WESTERN SOIL, INC.

UNITED STATES NUCLEAR
REGULATORY COMMISSION

By: Luis Roberto Santos
Bufete Luis Roberto Santos

By: R.W. Borchardt, Director
Office of Enforcement

Dated: August 15, 2000

UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

ATOMIC SAFETY AND LICENSING BOARD

Before Administrative Judges:

G. Paul Bollwerk, III, Chairman
Dr. Jerry R. Kline
Dr. Peter S. Lam

In the Matter of

Docket No. 72-22-ISFSI
(ASLBP No. 97-732-02-ISFSI)

PRIVATE FUEL STORAGE, L.L.C.
(Independent Spent Fuel Storage
Installation)

August 31, 2000

In this proceeding concerning the application of Private Fuel Storage, L.L.C. (PFS), under 10 C.F.R. Part 72 to construct and operate an independent spent fuel storage installation (ISFSI), the Licensing Board denies the late-filed request of individual petitioner William D. Peterson to intervene in the proceeding, finding that (1) a balancing of the five late-filing criteria of 10 C.F.R. § 2.714(a)(1) does not support entertaining the petition; (2) Petitioner Peterson has not established his standing to intervene as a matter of right; and (3) Petitioner Peterson has not presented a litigable contention.

RULES OF PRACTICE: NONTIMELY INTERVENTION PETITION
(PLEADING REQUIREMENTS; GOOD CAUSE FOR LATE FILING)

To justify a presiding officer's consideration of the "merits" of a late-filed intervention petition, i.e., whether the petition fulfills the standing and contention admissibility standards specified in 10 C.F.R. § 2.714, a petitioner must demonstrate that a balancing of the five factors set forth in section 2.714(a)(1)(i)-(v) supports accepting the petition. Good cause for late-filing is the first and most

important of the five balancing factors set forth in section 2.714(a)(1). *See, e.g.*, LBP-99-3, 49 NRC 40, 46 (1999); LBP-98-7, 47 NRC 142, 173, *reconsideration granted in part and denied in part on other grounds*, LBP-98-10, 47 NRC 288, *aff'd on other grounds*, CLI-98-13, 48 NRC 26 (1998).

**RULES OF PRACTICE: NONTIMELY INTERVENTION PETITION
(BALANCING OF 10 C.F.R. § 2.714(a)(1) CRITERIA)**

When good cause is lacking for late-filing under factor one of the five-factor late intervention balancing test set forth in section 2.714(a)(1), a petitioner must make a particularly strong showing in its favor on the other four factors. *See, e.g.*, *Duke Power Co.* (Perkins Nuclear Station, Units 1, 2, and 3), ALAB-431, 6 NRC 460, 462 (1977). Moreover, in this five-factor balancing test, factor two — other means to protect petitioner's interests — and factor four — adequacy of existing representation — are accorded less significance in the balance. *See Texas Utilities Electric Co.* (Comanche Peak Steam Electric Station, Unit 2), CLI-93-4, 37 NRC 156, 165 (1993).

**RULES OF PRACTICE: NONTIMELY INTERVENTION PETITION
(ASSISTANCE IN SOUND RECORD DEVELOPMENT)**

Sufficient specificity in describing the issues to be examined, the prospective witnesses, and the proposed testimony of those witnesses have been identified repeatedly as pertinent to an analysis of the section 2.714(a)(1) third factor — assistance in developing a sound record. *See Texas Utilities Electric Co.* (Comanche Peak Steam Electric Station, Units 1 and 2), CLI-88-12, 28 NRC 605, 611 (1988).

RULES OF PRACTICE: STANDING TO INTERVENE

The contemporaneous judicial standing concepts that are to be employed in NRC adjudicatory proceedings, *see Portland General Electric Co.* (Pebble Springs Nuclear Plant, Units 1 and 2), CLI-76-27, 4 NRC 610, 613-14 (1976), require that a petitioner must establish (1) it has suffered or will suffer a distinct and palpable injury that constitutes injury in fact within the zones of interests arguably protected by the governing statutes (e.g., the Atomic Energy Act of 1954 (AEA), the National Environmental Policy Act of 1969 (NEPA)); (2) the injury is fairly traceable to the challenged action; and (3) the injury is likely to be redressed by a favorable decision, *see Yankee Atomic Electric Co.* (Yankee Nuclear Power Station), CLI-96-1, 43 NRC 1, 6 (1996).

**ATOMIC ENERGY ACT: STANDING TO INTERVENE
(INJURY IN FACT)**

**RULES OF PRACTICE: STANDING TO INTERVENE
(INJURY IN FACT)**

If a petitioner's interest in a proceeding is to avoid "bad precedent," such a purported injury lacks the requisite concreteness to constitute injury in fact. *See General Public Utilities Nuclear Corp.* (Oyster Creek Nuclear Generating Station), LBP-96-23, 44 NRC 143, 159 (1996); *Ohio Edison Co.* (Perry Nuclear Power Plant, Unit 1), LBP-91-38, 34 NRC 229, 248-49 (1991), *aff'd on other grounds*, CLI-92-11, 36 NRC 41 (1992), *petition for review denied*, *City of Cleveland v. NRC*, 60 F.2d 1561 (D.C. Cir. 1995).

RULES OF PRACTICE: DISCRETIONARY INTERVENTION

When a petitioner lacks standing as a matter of right, the Board may still admit the petitioner as a matter of discretion. *See Pebble Springs*, CLI-76-27, 4 NRC at 616. If a petitioner does not request permission to intervene as a matter of discretion, discretionary intervention need not be considered. *See Babcock and Wilcox* (Apollo, Pennsylvania Fuel Fabrication Facility), LBP-93-4, 37 NRC 72, 94 n.66, *appeal dismissed*, CLI-93-9, 37 NRC 190 (1993).

**RULES OF PRACTICE: ADMISSIBILITY OF CONTENTIONS;
CONTENTIONS (ADMISSIBILITY, MATERIALITY, SPECIFICITY,
AND BASIS)**

Even if a petitioner is able to show it has standing (and that the late-filing criteria of section 2.174(a)(1) supported the admission of the intervention petition), it would still have to establish that it has presented one or more admissible contentions to gain party status in this proceeding. For a contention to be deemed admissible under 10 C.F.R. § 2.714(b)(2), the contention must consist of (1) a specific statement of the issue to be raised or controverted, with references to the specific portion of the license application in question; (2) a brief explanation of the bases for the contention; and (3) a concise statement of the alleged facts or expert opinion supporting the contention on which the petitioner intends to rely in proving the contention at any hearing, all of which must be sufficient to show that a genuine dispute exists on a material issue of law or fact. *See Yankee Atomic Electric Co.* (Yankee Nuclear Power Station), CLI-96-7, 43 NRC 235, 248-49 (1996); *Georgia Institute of Technology* (Georgia Tech Research Reactor, Atlanta, Georgia), CLI-95-12, 42 NRC 111, 117-18 (1995). A contention that fails to include any of these components, or that, if proven, would be of no consequence

to the proceeding because it would not entitle the petitioner to any relief, is subject to dismissal. *See* 10 C.F.R. § 2.714(d)(2); *see also Sequoyah Fuels Corp.* (Gore, Oklahoma Site Decontamination and Decommissioning Funding), LBP-94-8, 39 NRC 116, 117-18 (1994).

RULES OF PRACTICE: CONTENTIONS (CHALLENGE OF COMMISSION RULE, MATERIALITY)

Additionally, a contention is subject to dismissal if it (1) constitutes an attack on applicable statutory requirements; (2) challenges the basic structure of the Commission's regulatory process or is an attack on the agency's regulations; (3) is nothing more than a generalization regarding the petitioner's views of what applicable policies ought to be; (4) seeks to raise an issue that does not apply to the facility in question or is otherwise outside the scope of the proceeding; or (5) concerns a matter that will not afford the petitioner cognizable relief because it lacks significance relative to the agency's general responsibility and authority to protect the public health and safety and the environment. *See* LBP-98-7, 47 NRC at 178-79.

ATOMIC ENERGY ACT: PARTICIPATION BY A STATE

RULES OF PRACTICE: PARTICIPATION BY AN INTERESTED STATE OR LOCAL GOVERNMENT

The agency's long-standing interpretation of AEA section 189a, 42 U.S.C. § 2239(a), is that it permits intervention by state and local governments on relevant matters. *See Public Service Co. of New Hampshire* (Seabrook Station, Units 1 and 2), CLI-77-25, 6 NRC 535, 537 (1977).

**MEMORANDUM AND ORDER
(Denying Late-Filed Intervention Petition)**

On June 5, 2000, William D. Peterson filed a petition with the Licensing Board seeking to intervene in this proceeding concerning the June 1997 request of Private Fuel Storage, L.L.C. (PFS), for a 20-year license under 10 C.F.R. Part 72 to possess and store spent nuclear reactor fuel in an independent spent fuel storage installation (ISFSI) located on the reservation of the Skull Valley Band of Goshute Indians in Skull Valley, Utah. Both PFS and the NRC Staff oppose Petitioner Peterson's request, which comes nearly 3 years after the deadline for filing a timely intervention request, on a variety of grounds, including lack of

standing and litigable contentions and a failure to meet the late-filing elements of 10 C.F.R. § 2.714(a)(1).

For the reasons set forth below, we deny Mr. Peterson's petition to intervene, finding that (1) a balancing of the five late-filing criteria of section 2.714(a)(1) do not support entertaining the petition; (2) Mr. Peterson has not established his standing to intervene as a matter of right; and (3) Mr. Peterson has not presented a litigable contention.

I. BACKGROUND

On July 21, 1997, the Staff published a notice of opportunity for a hearing in the *Federal Register* regarding the PFS ISFSI license application. *See* 62 Fed. Reg. 41,099 (1997). A number of organizations and an individual filed requests for a hearing and petitions to intervene prior to the September 15, 1997 date by which such filings had to be submitted to be considered timely. *See* LBP-98-7, 47 NRC 142, 156-57, *reconsideration granted in part and denied in part on other grounds*, LBP-98-10, 47 NRC 288, *aff'd on other grounds*, CLI-98-13, 48 NRC 26 (1998). Intervenor State of Utah (State) was one of these timely petitioners that ultimately was granted party status, having been found to have standing and to have proffered admissible technical and environmental contentions relating to the PFS application. *See id.* at 247. Then, nearly 3 years after the deadline for filing timely intervention requests, following an April 2000 Board *Federal Register* notice announcing its intention to conduct a June 2000 evidentiary hearing in Salt Lake City, Utah, on certain of the State's admitted technical contentions and to conduct 10 C.F.R. § 2.715(b) limited appearance sessions to receive statements from interested members of the public, *see* 65 Fed. Reg. 24,230 (2000), Petitioner Peterson directed letters to the NRC Office of the Secretary, dated May 26 and May 31, 2000, and filed a June 5, 2000 petition indicating he wished to intervene in this proceeding. *See* Petition to Intervene, Third Party Complaint, for Intervenor's Use of State Law to Deprive PFS and [Pigeon Spur Storage Facility] of Rights of Storage of [Spent Nuclear Fuel] by Federal Law (June 5, 2000) [hereinafter Peterson Petition]. In that submission, Petitioner Peterson identified himself as an ISFSI license applicant for a site at Pigeon Spur, Utah, that has been assigned NRC Docket No. 72-23. *See id.* at 2.

By order dated June 7, 2000, the Board set a schedule for (1) Mr. Peterson to make a filing supplementing his intervention petition, including a statement of the contentions he wished to litigate and any other information he wished to provide regarding his standing or the applicability of the five late-filing factors of 10 C.F.R. § 2.714(a)(1); and (2) party responses to his late-filed intervention petition and contentions supplement. *See* Licensing Board Memorandum and Order (Setting Schedule for Supplement and Responses to Late-Filed Intervention

Petition) (June 7, 2000) (unpublished). Pursuant to this order, Petitioner Peterson made another filing on June 27, 2000, that consisted of twenty-seven numbered contentions dealing primarily with his interactions with the State regarding his proposed Pigeon Spur ISFSI facility. *See* Contentions, Third Party Complaint Intervention 10 C.F.R. § 2.714(b)(2) for Intervener's use of State Law to deprive PFS and [Pigeon Spur Storage Facility] of Rights of Storage of [Spent Nuclear Fuel] by Federal Law (June 27, 2000) [hereinafter Peterson Contentions].¹

On July 12, 2000, Applicant PFS and the Staff filed responses to Petitioner Peterson's filings; however, the State, which is the subject of much of the discussion in those submissions, made no responsive filing. Both PFS and the Staff assert that Mr. Peterson's petition should be denied in that (1) the petition does not meet the late-filing requirements promulgated by 10 C.F.R. § 2.714(a)(1); (2) Petitioner Peterson has failed to establish his standing as a matter of right; and (3) Petitioner Peterson has not presented an admissible contention. *See* [PFS] Answer to Petition to Intervene and Contentions of Mr. William D. Peterson (July 12, 2000) [hereinafter PFS Response]; NRC Staff's Response to Petition to Intervene and Contentions Filed by William D. Peterson (July 12, 2000) [hereinafter Staff Response]. On July 21, 2000, acting pursuant to Board permission, *see* Licensing Board Order (Scheduling Matters) (July 13, 2000) (unpublished), Petitioner Peterson submitted a reply filing that further addressed the five late-filing requirements identified by section 2.714(a)(1) and reiterated his motivation for attempting to intervene in this matter. *See* Reply & Motion for Findings, Ref: Third Party Complaint for Intervener's use of State Law to Deprive Peterson and [Pigeon Spur Storage Facility] of Rights of Storage of [Spent Nuclear Fuel] by Federal Law (July 21, 2000) [hereinafter Peterson Reply].²

¹ The following day, Petitioner Peterson filed another document apparently intended to supplement his contentions. *See* Additional Contentions Petition to Intervene from Sept. 2, 1997, Complaint (June 28, 2000). This document restated contention twenty-four from Petitioner Peterson's June 27, 2000 filing and also attached a document entitled "Complaint," which appears to have been filed in the United States District Court for the District of Utah. This document, which does not mention the PFS ISFSI application, contains nothing that alters any of our conclusions regarding the adequacy of Mr. Peterson's intervention petition.

² Petitioner Peterson submitted more documents on July 24, 2000, consisting of a letter directed to parties other than the NRC or the Licensing Board, and what appears to be a request for an extension of time to supplement Mr. Peterson's intervention petition. *See* Motion for Enlargement of Time Amendment, 40 Days Requested, Ref: Third Party Complaint for Intervener's Use of State Law to Deprive Peterson and [Pigeon Spur Storage Facility] of Rights of Storage of [Spent Nuclear Fuel] by Federal Law (July 24, 2000). These documents, however, contain nothing that provides cause for permitting further submissions by Mr. Peterson or alters any of our conclusions regarding the adequacy of Mr. Peterson's intervention petition. The same is true relative to two August 13, 2000 submissions by Petitioner Peterson, entitled "Request for Understanding."

II. ANALYSIS

1. Admission of Late-Filed Intervention Petition

To justify a presiding officer's consideration of the "merits" of a late-filed intervention petition, i.e., whether the petition fulfills the standing and contention admissibility standards specified in 10 C.F.R. § 2.714, a petitioner must demonstrate that a balancing of the five factors set forth in section 2.714(a)(1)(i)-(v) supports accepting the petition. The five factors are (1) good cause, if any, for failure to file on time; (2) the availability of other means whereby the petitioner's interest will be protected; (3) the extent to which the petitioner's participation may reasonably be expected to assist in developing a sound record; (4) the extent to which the petitioner's interests will be represented by existing parties; and (5) the extent to which the petitioner's participation will broaden the issues or delay the proceeding.

As we have observed on numerous occasions in this proceeding, good cause for late-filing is the first and most important of the five balancing factors set forth in section 2.714(a)(1). *See, e.g.*, LBP-99-3, 49 NRC 40, 46 (1999); LBP-98-7, 47 NRC 142, 173, *reconsideration granted in part and denied in part on other grounds*, LBP-98-10, 47 NRC 288, *aff'd on other grounds*, CLI-98-13, 48 NRC 26 (1998). Here, Petitioner Peterson filed his petition to intervene more than 2 years and 8 months after the September 17, 1997 deadline set out in the relevant July 1997 hearing opportunity notice. *See* 62 Fed. Reg. at 41,099. Petitioner Peterson's explanation of his delay in filing is a statement that "[w]hen Utah and Governor Leavitt intervened, he brought with him his 'policy' of the Federal Law does not apply in Utah. . . . The intervention of Utah and Governor Leavitt changed the original proceeding, which change affects NRC Docket No. 72-23, more so than 72-22." Peterson Petition at 10. Thereafter, in his reply filing Petitioner Peterson stated that "[t]he issue that troubles Peterson is Utah and its Governor v PFS and NRC which also applies to Pigeon Spur. The problem issues were/are made by intervener Utah, *not* NRC, *not* PFS. This strongly started after September 1997, after the intervener petitioning time." Peterson Reply at 4.

While asserting that the State's intervention into the proceeding is not an appropriate trigger for the good-cause test for late filing, PFS also declares that Petitioner Peterson has not given any justification for the more than 2-year delay between the grant of intervenor status to the State and the filing of his petition to intervene. *See* PFS Response at 3. As a result, PFS contends, good cause for late-filing is not present. For its part, the Staff argues that good cause for late-filing is not present because, given Petitioner Peterson's expressed concern with ISFSI matters and his distinct difference of opinion with the State, it is likely he knew or should have known about the State's status as an intervenor in this proceeding. *See* Staff Response at 6. Thus, albeit for slightly different reasons,

both PFS and the Staff argue that good cause for late-filing is absent because Petitioner Peterson has not explained the 2-year period of inactivity immediately prior to his June 5, 2000 filing.

From his filings, the best we can gather is that Petitioner Peterson believes good cause for filing his petition late is present because the deadline timely to file for intervenor status had passed prior to the granting of party status to the State of Utah. Since the apparent *raison d'être* for Petitioner Peterson's current intervention attempt is the State's entry into the proceeding, rather than PSF's initial ISFSI license application, he apparently contends that it would have been too difficult for him to foresee the entry of the State into the proceeding prior to the deadline for filing intervention petitions, and therefore he did not have the opportunity to file in a timely manner. In this regard, however, the Board finds persuasive the PFS and Staff argument that, whatever efficacy his "State admission" claim might have, Petitioner Peterson has failed to provide any explanation for the 2-year delay between the Board's April 22, 1998 action granting party status to the State and the filing of his June 2000 intervention petition.³ To the degree Petitioner Peterson's assertion that the entry of the State into the PFS ISFSI proceeding "changed" the original proceeding explains why the intervention petition was not filed prior to the September 15, 1997 deadline, it provides no justification for his ensuing 2-year delay. Such an extended, unexplained interval clearly compels a Board conclusion that good cause for filing late is not present.

When, as is the present case, good cause is lacking for late-filing under factor one of the five-factor late intervention balancing test set forth in section 2.714(a)(1), a petitioner must make a particularly strong showing in its favor on the other four factors. *See, e.g., Duke Power Co. (Perkins Nuclear Station, Units 1, 2, and 3), ALAB-431, 6 NRC 460, 462 (1977)*. Moreover, in this five-factor balancing test, factor two — other means to protect petitioner's interests — and factor four — adequacy of existing representation — are accorded less significance in the balance. *See Texas Utilities Electric Co. (Comanche Peak Steam Electric Station, Unit 2), CLI-93-4, 37 NRC 156, 165 (1993)*. Here, in considering factor two, the Board agrees with PFS and the Staff that there are other means available to Petitioner Peterson that could provide equally, if not more appropriate venues, in which he can challenge the purported policies of the State and its Governor relative to ISFSI licensing. *See* PFS Response at 4, Staff Response at 7. Indeed, in his petition, Mr. Peterson suggests there are other courts in which alleged injuries he sustained could potentially be redressed, including the United States District Court for the District of Utah in which he

³We note in this regard that Petitioner Peterson has been on notice since at least April 1998 that the State is a party to this proceeding. *See* 63 Fed. Reg. 23,476, 23,476-77 (1998) (Board notice of hearing indicating that State has been admitted as a party to PFS proceeding).

previously filed an action challenging the State's alleged policies. *See* Peterson Petition at 10. While the determination made by that court may not have been favorable to Petitioner Peterson, he presents nothing that indicates he would be barred from taking his concerns to a similar state judicial forum. Moreover, since the bulk of Petitioner Peterson's concerns appear to deal with his proposed ISFSI at Pigeon Spur, Utah, those concerns could be presented during an NRC licensing proceeding for the Pigeon Spur site if the facility application reaches that point. In sum, since there are other means to protect the Petitioner's interests, the Board finds that factor two does not weigh in favor of admitting Mr. Peterson's late-filed intervention petition.

Regarding factor three — the extent to which the Petitioner's participation may help develop a sound record — Mr. Peterson's intervention petition and subsequent filings have not demonstrated to the Board that, in the context of the issues he proposes to address, he would provide any supporting evidence that would develop a sound record. Petitioner Peterson's filings lack sufficient specificity in describing the issues to be examined, the prospective witnesses, and the proposed testimony of those witnesses — details that have been identified repeatedly as pertinent to an analysis of the section 2.714(a)(1) third factor. *See Texas Utilities Electric Co. (Comanche Peak Steam Electric Station, Units 1 and 2)*, CLI-88-12, 28 NRC 605, 611 (1988). With these important elements absent, Petitioner Peterson's filings fail to support a determination that his participation would help develop a sound record. Accordingly, the Board finds that factor three likewise does not weigh in favor of admitting the late-filed petition.

With regard to factor four — the extent to which the Petitioner's interests will be represented by existing parties — Petitioner Peterson seemingly has unique interests that he wishes to represent in this proceeding, although, as was previously noted, in many respects they would be best dealt with if and when the Pigeon Spur ISFSI application comes to fruition. Further, to the extent Petitioner Peterson's interests are pertinent to this proceeding, Petitioner Peterson has provided nothing to convince us that such interests are not already represented by existing parties. Mr. Peterson states in his petition that “[Pigeon Spur] will aid PFS in the contention of the ‘policy’ issue of Governor Leavitt.” Peterson Petition at 11. Assuming Petitioner Peterson is correct in this regard, however, as is apparent from its participation in this proceeding over the last 3 years, Applicant PFS is fully capable of representing its interests in this licensing proceeding on this and other matters. Accordingly, to the degree Petitioner Peterson's pertinent interests coincide with those of PFS, they will be adequately represented without his intervention. The Board thus finds that factor four does not weigh in favor of admitting the late-filed petition.

In connection with factor five — the extent to which the Petitioner's participation will broaden or delay the proceeding — it is apparent from his “contentions” statement that Petitioner Peterson's concerns are not currently

before the Board in this proceeding. These issues, which relate to matters ranging from Petitioner Peterson's prior dealings with the State regarding uranium mill tailings to his proposed Pigeon Spur, Utah ISFSI therefore would broaden and almost certainly delay this proceeding. Accordingly, the Board finds that factor five does not weigh in favor of admitting his late-filed intervention petition.

In sum, the Board finds that Petitioner Peterson has failed to demonstrate there is good cause for the late-filing of his intervention petition. Nor has he shown that a balancing of the remaining four factors in section 2.714(a)(1) makes a compelling showing favoring the admission of his petition. Consequently, the Board finds that Petitioner Peterson's late-filed petition should not be admitted.⁴

2. *Standing*

Even if Petitioner Peterson had shown that the late-filing criteria of section 2.714(a)(1) supported the admission of the intervention petition, he would still have to establish his standing as a matter of right to intervene in this proceeding. The contemporaneous judicial standing concepts that are to be employed in NRC adjudicatory proceedings, *see Portland General Electric Co.* (Pebble Springs Nuclear Plant, Units 1 and 2), CLI-76-27, 4 NRC 610, 613-14 (1976), require that a petitioner must establish (1) it has suffered or will suffer a distinct and palpable injury that constitutes injury-in-fact within the zones of interests arguably protected by the governing statutes (e.g., the Atomic Energy Act of 1954 (AEA), the National Environmental Policy Act of 1969 (NEPA)); (2) the injury is fairly traceable to the challenged action; and (3) the injury is likely to be redressed by a favorable decision, *see Yankee Atomic Electric Co.* (Yankee Nuclear Power Station), CLI-96-1, 43 NRC 1, 6 (1996).

The focus of this proceeding is the efficacy of the PFS application to construct and operate an ISFSI facility on the Skull Valley Band reservation. As the Staff points out, however, Petitioner Peterson's central assertion is that his ISFSI license application has been "hindered" by both the State's policy against spent nuclear fuel and the actions of the State's Governor. *See* Staff Response at 11-12. Thus, it is not the application of PFS for an ISFSI license that Petitioner Peterson asserts has caused or will cause him injury, it is the alleged actions of the State and its Governor adverse to Mr. Peterson that has motivated Petitioner Peterson to file an intervention petition in this matter.⁵

Indeed, as he has presented his claims, the best that can be said for Petitioner Peterson's interest in this proceeding is that it is to avoid "bad precedent," a purported injury that lacks the requisite concreteness to constitute injury in fact.

⁴ Our determination on the admissibility of Petitioner Peterson's late-filed petition likewise constitutes our ruling on the admissibility of the accompanying late-filed contentions. *See* LBP-99-3, 49 NRC at 46 n.1.

⁵ Utah Governor Michael Leavitt is not a party to the PFS ISFSI proceeding, nor has he sought such status.

See General Public Utilities Nuclear Corp. (Oyster Creek Nuclear Generating Station), LBP-96-23, 44 NRC 143, 159 (1996); *Ohio Edison Co.* (Perry Nuclear Power Plant, Unit 1), LBP-91-38, 34 NRC 229, 248-49 (1991), *aff'd on other grounds*, CLI-92-11, 36 NRC 41 (1992), *petition for review denied*, *City of Cleveland v. NRC*, 60 F.2d 1561 (D.C. Cir. 1995). Moreover, his purported injury arising from the actions of the State and its Governor do not fall within the zones of interest arguably protected by the respective statutes that govern this proceeding. Further, because Petitioner Peterson does not assert that his purported injury is a result of the PFS ISFSI application or its final outcome, the injury of which he complains cannot be traced back to the PFS ISFSI application. From this it follows that no determination of the Board regarding the license application would be likely to redress that asserted injury, regardless of the final outcome of this proceeding. Thus, for a variety of reasons, Petitioner Peterson lacks standing to intervene as a matter of right in this proceeding.⁶

3. *Admissibility of Contentions*

Of course, even if Petitioner Peterson was able to show that he had standing (and that the late-filing criteria of section 2.174(a)(1) supported the admission of the intervention petition), he would still have to establish that he had presented one or more admissible contentions to gain party status in this proceeding. For a contention to be deemed admissible under 10 C.F.R. § 2.714(b)(2) it must consist of (1) a specific statement of the issue to be raised or controverted, with references to the specific portion of the license application in question; (2) a brief explanation of the bases for the contention; and (3) a concise statement of the alleged facts or expert opinion supporting the contention on which the petitioner intends to rely in proving the contention at any hearing, all of which must be sufficient to show that a genuine dispute exists on a material issue of law or fact. *See Yankee Atomic Electric Co.* (Yankee Nuclear Power Station), CLI-96-7, 43 NRC 235, 248-49 (1996); *Georgia Institute of Technology* (Georgia Tech Research Reactor, Atlanta, Georgia), CLI-95-12, 42 NRC 111, 117-18 (1995). A contention that fails to include any of these components, or that, if proven, would be of no consequence to the proceeding because it would not entitle the petitioner to any relief, is subject to dismissal. *See* 10 C.F.R. § 2.714(d)(2); *see also Sequoyah Fuels Corp.* (Gore, Oklahoma Site Decontamination and Decommissioning Funding), LBP-94-8, 39 NRC 116, 117-18 (1994). Additionally, a contention is subject to dismissal if it (1)

⁶When a petitioner lacks standing as a matter of right, the Board may still admit the petitioner as a matter of discretion. *See Pebble Springs*, CLI-76-27, 4 NRC at 616. If a petitioner does not request permission to intervene as a matter of discretion, as is the case with Mr. Peterson's intervention filings, discretionary intervention need not be considered. *See Babcock and Wilcox* (Apollo, Pennsylvania Fuel Fabrication Facility), LBP-93-4, 37 NRC 72, 94 n.66, *appeal dismissed*, CLI-93-9, 37 NRC 190 (1993). We would add that, even if it were presented, we see nothing on the record before us that would cause us to grant discretionary intervention. *See LBP-98-7*, 47 NRC at 177-78.

constitutes an attack on applicable statutory requirements; (2) challenges the basic structure of the Commission's regulatory process or is an attack on the agency's regulations; (3) is nothing more than a generalization regarding the petitioner's views of what applicable policies ought to be; (4) seeks to raise an issue that does not apply to the facility in question or is otherwise outside the scope of the proceeding; or (5) concerns a matter that will not afford the petitioner cognizable relief because it lacks significance relative to the agency's general responsibility and authority to protect the public health and safety and the environment. *See* LBP-98-7, 47 NRC at 178-79.

The Board finds that none of Petitioner Peterson's twenty-seven numbered contentions meet the section 2.714 admission requirements as a result of either failing to demonstrate a genuine dispute on a material issue of fact or law; raising matters unrelated to the PFS facility license or otherwise outside the scope of this proceeding; failing to be of consequence in the proceeding because it would not entitle the Petitioner to relief; or a combination of these factors. Therefore, the Board concludes that none of the contentions is admissible as a result of these fundamental deficiencies.

As PFS properly notes, a central problem with a number of Petitioner Peterson's "issue statements" is that they fail to show any genuine dispute exists on a material issue of law or fact. *See* PFS Response at 7. Petitioner Peterson's contentions one through nine, while encompassing a variety of topics, are simply assertions about Utah law or Utah state government officials, as is depicted by contention two which states only that "Denise Chancellor, Esq. is an Assistant Attorney General for the State of Utah." Peterson Contentions at 2. With no indication that they in any way raise questions pertinent to the PFS facility or are of consequence to the proceeding as a basis for cognizable relief, these numbered assertions of fact, which are primarily what contentions one through nine constitute, do not in and of themselves present a disputed question of fact or law. As a result, we decline to admit Petitioner Peterson's contentions one through nine.

Contentions ten through twelve and fourteen through eighteen likewise do not meet the section 2.714(b), (d) admissibility standards, albeit for a somewhat different reason. Each of these eight contentions, which concerns some action or policy of the Utah Legislature or Governor, cite no specific event that occurred or statement that was made in support of the contention. Contention sixteen, for example, states only that "Utah's Governor has made and perpetuated false impressions about nuclear material." Peterson Contentions at 4. This type of ad hominem declaration is insufficient to provide the requisite basis for a contention. Moreover, it is not apparent how these matters relate to the licensing of the PFS facility, so as to be within the scope of this proceeding. As a result, admission of contentions ten through twelve and fourteen through eighteen is denied.

Contentions thirteen, nineteen through twenty-five, and twenty-seven do not meet the section 2.714(b) requirement that a contention must seek to raise an issue

that applies to the licensing of the PFS facility so as to be within the scope of the proceeding. These contentions generally relate to (1) the Petitioner's proposed ISFSI at Pigeon Spur, Utah, and (2) the Petitioner's claims for monetary damages arising from the purported State action (or inaction) regarding that ISFSI, but do not indicate a connection to the proposed PFS ISFSI license. In fact, none of these nine contentions mention the proposed PFS ISFSI facility. As a result, these contentions are inadmissible because, in failing to apply to the PFS facility in question, they are outside the scope of this proceeding.

Finally, in connection with contention twenty-six, Petitioner Peterson makes the assertion that "a) Details of construction oversight and fire control are county issues. b) They should be worked out between the county people and project engineers. c) The State's seeing these matters in contention is out of line." Peterson Contentions at 8. Putting aside the problems with this contention as it generally seems to challenge the agency's long-standing interpretation of AEA section 189a, 42 U.S.C. § 2239(a), as permitting intervention by state and local governments on relevant matters, *see Public Service Co. of New Hampshire* (Seabrook Station, Units 1 and 2), CLI-77-25, 6 NRC 535, 537 (1977), it also lacks specificity so as to provide an adequate basis for the contention. Thus, as with Petitioner Peterson's other contentions, we reject this issue statement as well.

III. CONCLUSION

Having failed to establish (1) good cause for filing his intervention or that the other four elements of the late-filing balancing test of section 2.714(a)(1) provide compelling support for the admission of his petition, (2) that he will suffer a cognizable injury in fact that is within the statutory zone of interests or that can be redressed by this proceeding so as to show he has standing as of right, and (3) that any of the "contentions" he has set forth are admissible in accordance with the requirements 10 C.F.R. § 2.714(b), (d), Petitioner Peterson's request to be admitted as a late intervenor in this proceeding is rejected.

For the foregoing reasons, it is, this thirty-first day of August 2000, ORDERED:

1. That the June 5, 2000 petition of William D. Peterson to intervene in this proceeding is *denied*.

2. In accordance with the provisions of 10 C.F.R. § 2.714a(a), as it rules upon an intervention petition, this Memorandum and Order may be appealed to the Commission within 10 days after it is served.

THE ATOMIC SAFETY AND
LICENSING BOARD⁷

G. Paul Bollwerk, III
ADMINISTRATIVE JUDGE

Dr. Jerry R. Kline
ADMINISTRATIVE JUDGE

Dr. Peter S. Lam
ADMINISTRATIVE JUDGE

Rockville, Maryland
August 31, 2000

⁷Copies of this Memorandum and Order were sent this date by Internet e-mail transmission to Petitioner William D. Peterson and to counsel for (1) Applicant PFS; (2) Intervenors Skull Valley Band, Ohngo Gaudadeh Devia, Confederated Tribes of the Goshute Reservation, Southern Utah Wilderness Alliance, and the State; and (3) the Staff.

UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

COMMISSIONERS:

Richard A. Meserve, Chairman
Greta Joy Dicus
Nils J. Diaz
Edward McGaffigan, Jr.
Jeffrey S. Merrifield

In the Matter of

Docket Nos. 50-245-LT
50-336-LT
50-423-LT

NORTHEAST NUCLEAR ENERGY
COMPANY and
CONSOLIDATED EDISON COMPANY
OF NEW YORK, INC.
(Millstone Nuclear Power Station,
Units 1, 2, and 3)

September 13, 2000

The Commission concludes that Petitioners have failed to demonstrate standing and admissible issues in a license transfer proceeding, and therefore denies the petition to intervene and terminates the proceeding. The Commission also denies a request for a stay of NRC proceedings pending reviews by other agencies and a request for an independent investigation of the NRC Staff decision to approve the license transfer.

RULES OF PRACTICE: INTERVENTION (STANDING AND ISSUES)
LICENSE TRANSFER

Specificity is the hallmark of Subpart M. Neither notice pleading, nor the filing of a vague, particularized issue, nor the submission of general assertions or conclusions suffices to trigger a license transfer hearing. 10 C.F.R. § 2.1306.

RULES OF PRACTICE: INTERVENTION (STANDING)

LICENSE TRANSFER

To seek representational standing on behalf of members, an organizational petitioner must show how at least one of its members may be affected by the licensing action, must identify the member by name and address, and must show (preferably by affidavit) that the organization is authorized to request a hearing on behalf of the member.

RULES OF PRACTICE: INTERVENTION (STANDING)

LICENSE TRANSFER

Standing to intervene in another case, involving an addition to the physical facility, says nothing about standing to intervene in a license transfer proceeding involving simply a change in corporate structure a couple of levels above the current plant operator.

LICENSE TRANSFER

INDIRECT TRANSFERS

There can be no serious question about the Commission's legal power to approve the "indirect transfer" of control over NRC operating licenses. Both the Atomic Energy Act and NRC rules explicitly confer such power. *See* 42 U.S.C. § 2234; 10 C.F.R. § 50.80(a).

LICENSE TRANSFER

INDIRECT TRANSFERS

The question in indirect transfer cases is whether the proposed shift in ultimate corporate control will "affect" a licensee's existing financial and technical qualifications.

RULES OF PRACTICE: INTERVENTION (ISSUES)

LICENSE TRANSFER

General allegations of mismanagement and environmental degradation do not trigger a license transfer hearing under Subpart M, which requires petitioners to plead specific grievances supported by facts, experts, or documents.

RULES OF PRACTICE: INTERVENTION (STAY OF PROCEEDINGS)

LICENSE TRANSFER

To be meaningful, NRC review of license transfers must precede the actual transfer. The Commission does not believe it sensible or efficient to delay its license transfer reviews pending the action of other reviewing agencies.

MEMORANDUM AND ORDER

In this case, two citizen groups, the Connecticut Coalition Against Millstone and the Long Island Coalition Against Millstone, have filed a petition to intervene and request for a hearing under 10 C.F.R. Part 2, Subpart M, on an application for an “indirect transfer” of the operating licenses for the Millstone Nuclear Power Station, Units 1, 2, and 3. *See* 65 Fed. Reg. 18,381 (April 7, 2000). The NRC Staff approved the transfer on August 22, 2000, subject to the outcome of this adjudicatory proceeding.¹ We now deny the petition.

The Millstone transfer application arises out of a proposed merger between Consolidated Edison, Inc. (CEI), and Northeast Utilities (NU) into one entity known as the “new” CEI. *Id.* NU is the parent of several subsidiary corporations that hold NRC licenses to own or operate the three Millstone power reactors. *Id.* One of those subsidiaries, Northeast Nuclear Energy Company (NNECO), is “exclusively authorized” to operate the reactors. *Id.* The merger will make the new CEI an “indirect parent” of all NU subsidiaries, including NNECO, but NNECO will “continue to have exclusive responsibility for the management, operation, and maintenance of Units 1, 2, and 3.” *Id.*

Under Subpart M, petitioners challenging a license transfer must demonstrate their “standing” to intervene and must proffer “issues” suitable for a hearing. *See* 10 C.F.R. §§ 2.1306(b)(3), 2.1308(a) (standing); 10 C.F.R. § 2.1306(b)(2) (issues). The “standing” inquiry examines whether petitioners’ “interest will be affected” by the license transfer. *See* 10 C.F.R. § 2.1308(a)(2). The “issues” inquiry considers whether petitioners’ grievances are “within the scope” of the proceeding and “relevant to the findings the NRC must make.” *See* 10 C.F.R. § 2.1306(b)(2). Our rules call on petitioners to “specify . . . the facts” supporting their standing (10 C.F.R. § 2.1306(b)(3)) and to “provide a concise statement

¹ *See Connecticut Light and Power Co. et al.*, Order Approving Application Regarding Corporate Merger of Consolidated Edison, Inc. and Northeast Utilities (Aug. 22, 2000). Recently, in *Vermont Yankee Nuclear Power Corp.* (Vermont Yankee Nuclear Power Station), CLI-00-17, 52 NRC 79 (2000), we explained the interplay between NRC Staff approval of license transfer applications and the Commission’s adjudicatory process under Part 2, Subpart M.

of the alleged facts or expert opinion” supporting their issues, “together with references to the sources and documents on which [they] intend[] to rely” (10 C.F.R. § 2.1306(b)(2)(iii)).

Specificity, in short, is the hallmark of Subpart M. Neither “notice pleading,” nor “the filing of a vague, unparticularized issue,” nor the submission of “general assertions or conclusions,” suffices to trigger a license transfer hearing. *See GPU Nuclear Inc.* (Oyster Creek Nuclear Generating Station), CLI-00-6, 51 NRC 193, 202-03 (2000); *accord Northern States Power Co.* (Monticello Nuclear Generating Plant; Prairie Island Nuclear Generating Plant, Units 1 and 2; Prairie Island Independent Spent Fuel Storage Installation), CLI-00-14, 52 NRC 37, 47 (2000). Here, Petitioners have filed a cursory four-page pleading that fails to provide the degree of specificity required by our threshold standing and admissibility standards.

Petitioners claim standing on the ground that their organizations represent member-families residing within 5 to 10 miles of the Millstone reactors. To seek “representational standing” on behalf of members, however, an organizational petitioner must show “how at least one of its members may be affected by the licensing action (such as by activities on or near the site), must identify [the] member by name and address, and must show (preferably by affidavit) that the organization is authorized to request a hearing on behalf of [the] member.” *Oyster Creek*, 51 NRC at 202 (citing cases). Petitioners have done none of this. Their petition to intervene does state an intent to supply affidavits supporting their standing “under separate cover.” But we have received no such affidavits. Petitioners also did not take advantage of our rule, 10 C.F.R. § 2.1307(b), permitting them to reply to the transfer applicants’ opposition to standing. Petitioners’ failure to substantiate their standing as required by our rules is fatal to their petition to intervene and request for a hearing.

Rather than trying to meet the standing requirements prescribed in our rules and in our cases, Petitioners instead point out that an NRC Licensing Board has recognized their standing to challenge a proposed license amendment seeking an expansion of Millstone’s spent fuel pool. But Petitioners’ standing to intervene in another case — involving an addition to the physical facility — tells us nothing about their standing in *this case*, which involves simply a change in corporate structure a couple of levels above the current plant operator. *See Texas Utilities Electric Co.* (Comanche Peak Steam Electric Station, Unit 2), CLI-93-4, 37 NRC 156, 163 (1993) (“a prospective petitioner has an affirmative duty to demonstrate that it has standing in *each* proceeding in which it seeks to participate since a petitioner’s status can change over time and the bases for its standing in an earlier proceeding may no longer obtain”). The transfer application at issue here proposes no change in the Millstone licensees, no change in the Millstone facility, no change in its operation, no change in its personnel, and no change in its financing. It is far from obvious how NU’s corporate restructuring would affect

Petitioners' interests. Given Petitioners' failure to advance a plausible claim of harm, we cannot recognize their standing to seek an agency hearing.

Petitioners' "issues" similarly fall short. Petitioners claim initially that the Commission lacks legal authority, and lacks sufficient information, to pass on the indirect license transfer arising out of the NU-CEI merger. But there can be no serious question about the Commission's legal power to approve the "indirect transfer" of control over NRC operating licenses. Both the Atomic Energy Act and NRC rules explicitly confer such power. *See* 42 U.S.C. § 2234; 10 C.F.R. § 50.80(a). Nor have Petitioners made out a persuasive claim of lack of information. The question in indirect transfer cases, as the Commission said when announcing the opportunity for a hearing in this case, is whether the proposed shift in ultimate corporate control will "affect" a licensee's existing financial and technical qualifications. *See* 65 Fed. Reg. at 18,381. The transfer applicants need provide only information bearing on the inquiry at hand, and not more extensive information that may be necessary in other contexts. *Cf. Monticello*, 52 NRC at 50-51. Petitioners do not specify what relevant information is lacking here — other than a missing address that has now been supplied — that would be necessary to enable the Commission to assess the NU-CEI transfer application.

Petitioners do say that they are "devoted to the permanent closure" of the Millstone reactors and argue in general terms that ongoing environmental wrongs and mismanagement should preclude Commission approval of the NU-CEI license transfer. But general allegations of mismanagement and environmental degradation do not trigger a license transfer hearing under Subpart M, which as we noted above requires Petitioners to plead specific grievances supported by facts, experts, or documents. Moreover, the license transfer application at issue here has little or nothing to do with how Millstone is now run. Millstone's operational safety, while vitally important and subject to ongoing agency oversight, does not turn on whether the Commission grants or denies the NU-CEI license transfer application. Either way, the current licensed operator, NNECO, will remain in charge of the facility. Petitioners' operational and environmental claims are therefore not relevant to the license transfer application. "A license transfer proceeding is not a forum for a full review of all aspects of current plant operation." *Oyster Creek*, 51 NRC at 213, 214.²

²In addition to the issues discussed in the text, Petitioners argue that the Commission's review is "premature" because the NU-CEI merger is not yet consummated and that the Commission ought not consider the indirect transfer of the Indian Point and Seabrook licenses that also are implicated by the merger. These arguments are frivolous. To be meaningful, NRC review of license transfers must precede the actual transfer. Contrary to Petitioners' apparent view, the Commission does not believe it sensible or efficient to delay its license transfer reviews pending the action of other reviewing agencies. *See Niagara Mohawk Power Corp.* (Nine Mile Point Nuclear Station, Units 1 and 2), CLI-99-30, 50 NRC 333, 343-44 (1999). As for the Indian Point and Seabrook indirect license transfers, they are not part of this proceeding. They were the subject of separate *Federal Register* notices and were approved by the NRC Staff by separate orders. No one sought an adjudicatory hearing on those transfers.

The bottom line here is that Petitioners oppose continued operation of the Millstone reactors and distrust the current Millstone management. That overriding concern of Petitioners, however, simply does not bear on whether the NU-CEI merger, and consequent indirect license transfer, contravene NRC rules. Petitioners have provided no reason justifying an adjudicatory hearing in this case.

There is one final matter. On August 28, 2000, Petitioners filed a request for a stay of the NRC Staff's August 22 order approving the indirect transfer (*see* note 1, *supra*) and also demanded an "independent investigation of the circumstances surrounding the [Staff] decision at issue." We deny the stay application as moot, in view of our decision today that Petitioners are not entitled to a hearing, and we see no basis for an independent investigation of the Staff order approving the indirect transfer. *See Vermont Yankee*, CLI-00-17, *supra* note 1.

The petition for leave to intervene and the request for a hearing are denied, the application for a stay and the request for an independent investigation are denied, and the proceeding is terminated.

IT IS SO ORDERED.

For the Commission³

ANNETTE L. VIETTI-COOK
Secretary of the Commission

Dated at Rockville, Maryland,
this 13th day of September 2000.

³ Commissioner Dicus was not present for the affirmation of this Order. If she had been present, she would have approved it.

UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

COMMISSIONERS:

Richard A. Meserve, Chairman
Greta Joy Dicus
Nils J. Diaz
Edward McGaffigan, Jr.
Jeffrey S. Merrifield

In the Matter of

Docket Nos. 50-263-LT
50-282-LT
50-306-LT
72-10-LT
(consolidated)

**NORTHERN STATES POWER
COMPANY**

**(Monticello Nuclear Generating Plant;
Prairie Island Nuclear Generating
Plant, Units 1 and 2;
Prairie Island Independent Spent
Fuel Storage Installation)**

September 13, 2000

In CLI-00-14, the Commission recognized that Petitioners had, at least arguably, not had a full opportunity to address the *precise* theory on which the Commission rested its finding that Nuclear Management is financially qualified to operate several nuclear facilities. The Commission in CLI-00-14 therefore authorized them to file a consolidated request for reconsideration of CLI-00-14. *See* CLI-00-14, 52 NRC 37, 51 (2000) (emphasis in original). On August 15, 2000, Ms. Overland and the Water Office filed a timely consolidated request for reconsideration of CLI-00-14. In the instant order, the Commission denies Petitioners' request for reconsideration on the ground that they fail to address the theory on which the Commission based its ruling regarding Nuclear Management's financial qualifications.

MEMORANDUM AND ORDER

This proceeding involves Northern States Power Company's two applications for Commission approval of the proposed license transfers concerning the Monticello Nuclear Generating Plant, the Prairie Island Nuclear Generating Plants (Units 1 and 2), and the Materials License for the Prairie Island Independent Spent Fuel Storage Installation. The applications presented, among other things, an issue of first impression: whether a nonutility, nonowner entity whose sole responsibility is the actual operation of a nuclear facility must satisfy the financial qualification requirements of our regulations if costs to operate the facilities are ensured by a rate-regulated and NRC-licensed utility.

Ms. Carol Overland, the North American Water Office, and the Prairie Island Indian Community sought intervention and a hearing to oppose the transfers. On August 1, 2000, we issued CLI-00-14, denying these three petitions to intervene and requests for hearing. 52 NRC 37. In that order, however, we rejected Northern States' argument that the company to which it sought to transfer the operating responsibility for the above-named facilities (Nuclear Management Corporation) was, in effect, exempt from our financial qualification requirements. *See id.* at 49-50. We instead concluded that Nuclear Management was subject to, but had satisfied, those requirements on the record of this case. We based this conclusion on the nature of Nuclear Management's licensed "activities" — i.e., operating the Prairie Island and Monticello plants, not funding them. *See* 10 C.F.R. § 50.33(f). In view of Northern States's electric utility status (and its assurance of cost recovery through regulated rates) and its commitment to assume full financial responsibility for funding the safe operation, maintenance, and decommissioning of the plants,¹ we found no "plausible concerns" that Northern States would not reliably fund safe operation of the plant. *See id.* at 50-51 n.17.

However, we recognized that "Petitioners arguably [had] not had a full opportunity to address the *precise* theory on which we rest [the] finding that Nuclear Management is financially qualified." We therefore authorized them to file a consolidated request for reconsideration of CLI-00-14. *See id.* at 51 (emphasis in original). On August 15, 2000, Ms. Overland and the Water Office filed a timely consolidated request for reconsideration of CLI-00-14, indicating their understanding that the Indian Community was not intending to pursue the matter further. The request for reconsideration challenges the transfer of the operating authority from Northern States to Nuclear Management.² On August 29, 2000, Northern States filed an answer opposing Petitioners' request.

¹ *See id.* at 50. We also approved the transfer of ownership from Northern States to that company's successor, New NSP.

² The request does not challenge the transfer of ownership from Northern States to New NSP.

Petitioners' request for reconsideration fails to address the theory on which we based our ruling regarding Nuclear Management's financial qualifications. Petitioners instead reiterate their own interpretation of the germane regulations regarding financial qualifications — an interpretation we fully considered and rejected in CLI-00-14 (52 NRC at 49-51).³ In finding Nuclear Management financially qualified, our decision relied on the state regulator's revenue guarantee to Northern States. The decision also pointed to Northern States's own service agreement with Nuclear Management providing for cost-passthrough. *Id.* at 51 (emphasis omitted). In addition, of course, Northern States is legally obliged to fund safe operations at its nuclear facilities.

Petitioners, though, do not challenge Northern States' ability to honor its commitments under its license and under the contractual cost-passthrough provisions. Indeed, the request for reconsideration never even refers to the service agreement. Under these circumstances, we see no reason to revisit our finding that Nuclear Management is financially qualified or to hold a hearing on the question.

Petitioners do raise one new argument, albeit unrelated to Northern States's ability to honor its financial commitments. Petitioners interpret CLI-00-14 as requiring them to provide "affidavits of experts" — a requirement Petitioners consider inappropriate given that the issues here are legal rather than factual. We agree with Petitioners that the issues raised in their petitions to intervene are legal and therefore did not lend themselves to factual affidavits. However, we never required Petitioners to submit affidavits on those legal issues, nor did CLI-00-14 fault them for failing to do so. That order's only references to affidavits and experts appear in our general introductory description of the Commission's standards for standing and admissible issues in license transfer proceedings. *See id.* at 47 (referring to affidavits showing that a petitioning organization is authorized to request a hearing on behalf of that member) and 48 (referring to facts or expert opinion).⁴

For the reasons set forth above, the Commission denies Ms. Overland's and the Water Office's request for reconsideration.

³ In their request for reconsideration, Petitioners assert that Nuclear Management is a newly formed entity that must satisfy a more stringent standard for financial assurance. This assertion alludes to the requirements of 10 C.F.R. § 50.33(f)(3)(i) and (ii) and is a verbatim reiteration of a statement both Ms. Overland and the Water Office included in the "Factual Background" section of their Petitions to Intervene Regarding the Nuclear Management Application. Petitioners also raised related arguments, albeit in quite different language, as Issues 6 and 7 in their petitions to intervene, relying specifically on sections 50.33(f)(3)(i) and (ii). In CLI-00-14, we declined to admit those two issues. 52 NRC at 49-51, 56-57. We deemed Nuclear Management "financially qualified on the current record" and therefore found "the detailed financial reporting requirements of section 50.33(f)(3) not applicable." *Id.* at 56.

⁴ However, had Petitioners in their motion for reconsideration chosen to challenge Northern States's ability to pay the expenses of the Prairie Island and Monticello facilities, such a challenge would have been factual in nature and therefore would have required expert opinion or documentary support.

IT IS SO ORDERED.

For the Commission⁵

ANNETTE L. VIETTI-COOK
Secretary of the Commission

Dated at Rockville, Maryland,
this 13th day of September 2000.

⁵ Commissioner Dicus was not present for the affirmation of this Order. If she had been present, she would have approved it.

UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

ATOMIC SAFETY AND LICENSING BOARD

Before Administrative Judges:

Charles Bechhoefer, Presiding Officer
Dr. Richard F. Cole, Special Assistant

In the Matter of

**Docket Nos. 40-8794-MLA
40-8778-MLA
(ASLBP No. 99-769-08-MLA)
(Temporary Storage of
Decommissioning Wastes)**

**MOLYCORP, INC.
(Washington, Pennsylvania)**

September 26, 2000

In a proceeding involving a proposal for temporary storage of waste material at a site in Washington, Pennsylvania, in which the Licensee has determined to ship the waste material elsewhere and to withdraw its request for a license amendment for the Washington, Pennsylvania site, the Presiding Officer approves a stipulation between the parties for withdrawal of the Intervenors' hearing requests and termination of the proceeding as moot.

**MEMORANDUM AND ORDER
(Approving Stipulation and Terminating Proceeding)**

This proceeding involves a proposed license amendment to Molycorp, Inc.'s License SMB-1393, seeking authority for the temporary storage of decommissioning waste material from a site in York, Pennsylvania, at the Licensee's site in Washington, Pennsylvania. In a Memorandum and Order dated April 11, 2000, LBP-00-10, 51 NRC 163 (2000), the Presiding Officer, *inter alia*,

granted requests for a hearing of Canton Township, Pennsylvania (Canton), and the City of Washington, Pennsylvania (Washington). This “Temporary Storage” proceeding is subject to the informal hearing procedures of 10 C.F.R. Part 2, Subpart L.

On September 21, 2000, the Licensee submitted for my review and approval a stipulation, signed by representatives of Molycorp, Canton, and Washington, for withdrawal of the hearing requests and termination of the Temporary Storage proceeding.¹ The stipulation, a copy of which is attached to this Decision, was motivated by the election of Molycorp to transport the wastes to a waste-disposal facility in Texas, thus rendering this proceeding moot. The NRC Staff approved the disposal in Texas by letter dated July 31, 2000, a copy of which was provided to me. Subsequently, on August 1, 2000, Molycorp formally withdrew its request for amendment of License SMB-1393.

Upon consideration of the Stipulation for Withdrawal of Hearing Requests and Termination of Proceeding, it is, this 26th day of September 2000, ORDERED:

1. The Canton and Washington requests in the “Temporary Storage” proceeding to withdraw their hearing petitions are hereby *granted*.
2. The “Temporary Storage” proceeding is hereby *terminated* with prejudice.
3. This Memorandum and Order is effective immediately and, absent appeal, will become the final order of the Commission thirty (30) days after the date of issuance. *See* 10 C.F.R. § 2.1251(a). This Memorandum and Order is appealable to the Commission in accordance with the provisions of 10 C.F.R. § 2.1253 (which incorporates by reference the provisions of 10 C.F.R. §§ 2.786 and 2.763).

Charles Bechhoefer, Presiding Officer
ADMINISTRATIVE JUDGE

Rockville, Maryland
September 26, 2000

[Copies of this Memorandum and Order were e-mailed this date to counsel for the parties, as well as the NRC Staff.]

¹Pursuant to 10 C.F.R. § 2.1213, the NRC Staff elected not to participate in this proceeding.

ATTACHMENT

UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

ATOMIC SAFETY AND LICENSING BOARD PANEL

Before Administrative Judges:

Charles Bechhoefer, Presiding Officer
Dr. Richard F. Cole, Special Assistant

In the Matter of

**Docket Nos. 40-8794-MLA
40-8778-MLA
(ASLBP No. 99-769-08-MLA)
(Temporary Storage of
Decommissioning Wastes)**

**MOLYCORP, INC.
(Washington, Pennsylvania)**

**STIPULATION FOR WITHDRAWAL OF
HEARING REQUESTS AND TERMINATION
OF PROCEEDING**

Molycorp Inc., Canton Township, and City of Washington, through their respective counsel, submit the following stipulation for the dismissal of the requests for hearing filed by Canton Township and the City of Washington pursuant to a Notice of Receipt of an Amendment Request for the Temporary Storage of Decommissioning Waste from the Molycorp York, Pennsylvania Facility, and for the termination of this proceeding. In support hereof, the parties state as follows:

1. In January of 1998, Molycorp requested an amendment to its License No. SMB-1393, seeking approval for the interim storage of decommissioning materials from Molycorp's York, Pennsylvania facility at Molycorp's Washington, Pennsylvania facility.

2. On or about June 9, 1999, a Notice of Receipt of an Amendment Request for the Temporary Storage of Decommissioning Waste from the Molycorp York, Pennsylvania Facility was published in the *Federal Register* relative to this proposed license amendment.

3. Thereafter, both Canton Township and the City of Washington filed requests for a hearing under Subpart L of 10 CFR Part 2.

4. By order dated April 11, 2000, this court granted Canton Township's and the City of Washington's requests for a hearing regarding Molycorp's proposed license amendment for the temporary storage of York decommissioning materials (hereinafter referred to as the "Temporary Storage Proceeding").

5. Thereafter, Molycorp elected to dispose of the York decommissioning materials at the Waste Control Specialist ("WCS") facility in Andrews, Texas.

6. Counsel for Molycorp notified respective counsel for Canton Township and the City of Washington of Molycorp's election to dispose of the York decommissioning materials at WCS, and of Molycorp's intention to withdraw its proposed license amendment pertaining to temporary storage of the York decommissioning materials once Molycorp received NRC approval for disposal at WCS.

7. Counsel for Canton Township and the City of Washington thereafter agreed that once Molycorp withdrew its proposed license amendment pertaining to temporary storage of the York decommissioning materials, both Canton Township and the City of Washington would withdraw their requests for hearing in the Temporary Storage Proceeding and would agree to a termination of this proceeding.

8. By letter dated July 31, 2000, the NRC notified Molycorp of the NRC's approval of disposal of the York decommissioning materials at WCS.

9. By letter dated August 1, 2000, Molycorp withdrew its request for an amendment to its License No. SMB-1393, seeking approval for the temporary storage of decommissioning materials from Molycorp's York, Pennsylvania facility at Molycorp's Washington, Pennsylvania facility. A copy of this letter is attached as Exhibit A.

10. Pursuant to Molycorp's withdrawal of the above-referenced requested license amendment, and in accordance with the agreement of counsel, the parties hereby stipulate and agree that the requests for a hearing under Subpart L of 10 CFR Part 2 submitted by Canton Township and the City of Washington in the

Temporary Storage Proceeding are hereby withdrawn, and the Temporary Storage Proceeding shall be terminated with prejudice.

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UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

ATOMIC SAFETY AND LICENSING BOARD

Before Administrative Judges:

Charles Bechhoefer, Chairman
Dr. Richard F. Cole, Special Assistant

In the Matter of

Docket No. 40-8778-MLA-2
(ASLBP No. 00-775-03-MLA)
(Site Decommissioning Plan)

MOLYCORP, INC.
(Washington, Pennsylvania)

September 28, 2000

In a Memorandum and Order reflecting an earlier telephone conference, in a proceeding involving a two-part site decommissioning plan, where the NRC Staff has indicated that a separate notice of opportunity for hearing would be issued with respect to the second part, the Presiding Officer grants an Intervenor's request for a hearing on the first part, establishes initial schedules with respect to that proceeding, and provides for the Staff to forward directly to the Intervenor the Notice of Opportunity for Hearing on the second part of the plan. The Presiding Officer also denies a motion by a municipal entity that had not thus far sought to participate in the Part-1 proceeding.

MEMORANDUM AND ORDER
(Telephone Conference Call, 9/19/00)

I. BACKGROUND

On Tuesday afternoon, September 19, 2000, the Presiding Officer convened a transcribed telephone call (Tr. 1-43) to ascertain the status of this proceeding

and to establish schedules for future filings and other activities. Participating, in addition to the Presiding Officer, Judge Charles Bechhoefer, were Judge Richard F. Cole, Special Assistant; Randolph T. Struk, Esq., for the Licensee, Molycorp, Inc.; Samuel P. Kamin, Esq., and David A. Wolf, Esq., for the Petitioner, Canton Township, Pennsylvania (Canton); Chad Smith, the Superintendent of Canton; and John T. Hull, Esq., for the NRC Staff (Staff). Lee S. Dewey, Esq., counsel to the Atomic Safety and Licensing Board Panel (ASLBP), was also present.

This proceeding involves a site decommissioning plan (SDP) for the Licensee's former processing facility located in Washington, Pennsylvania. By Memorandum and Order dated April 11, 2000, LBP-00-10, 51 NRC 163, the Presiding Officer had, *inter alia*, granted Canton's request for a hearing in the related Temporary Storage proceeding but (at the suggestion of the NRC Staff) deferred action on Canton's then-pending request for a hearing in this Decommissioning Proceeding.¹ At that time, the Licensee had submitted Part 1 of its SDP, with Part 2 scheduled for submission at a later date. Each Part of the SDP deals with different segments of the site, with Part 1 calling for unrestricted decommissioning (*see* 10 C.F.R. § 20.1402) of its portion of the site and Part 2 calling for restricted decommissioning (*see* 10 C.F.R. § 20.1403) of the remainder of the site.

The Presiding Officer at the outset of the telephone conference called upon the Staff to delineate the procedural status of the proceeding. The Staff observed that only Part 1 of the Decommissioning Plan had been submitted at the time of publication (November 16, 1999) of the Notice of Opportunity for Hearing in this proceeding. Part 2 was submitted on June 30, 2000. Judge Bechhoefer noted that, as set forth in LBP-00-10, he had interpreted the Notice as providing an opportunity for a hearing with respect to the decommissioning plan as a whole (not limited to the already submitted Part 1) and, because the submitted areas of concern related to information in both parts of the plan, he had deferred ruling on the pending hearing request from Canton, in terms both of Canton's standing and its areas of concern. (The Staff had urged the Presiding Officer to take that course of action.)

On August 2, 2000, Molycorp advised the Presiding Officer (by e-mail) that, on July 14, 2000, it had submitted Part 2 of the decommissioning plan. By letter dated August 15, 2000, the Staff confirmed that it had received Part 2 on July 14 but that its technical review had not yet commenced. The Staff also advised that it had completed its Safety Evaluation Report (SER) and Environmental Assessment (EA) for Part 1 and had transmitted copies of these documents to the parties and Petitioner. In addition, it recommended that the Presiding Officer proceed to determine whether there is sufficient information to rule on Canton's standing to contest Part 1 of the plan.

¹ By Memorandum and Order dated September 26, 2000, LBP-00-24, 52 NRC 139, the Presiding Officer approved a stipulation of the parties to the Temporary Storage proceeding and terminated the proceeding.

On August 31, 2000, Canton, the Petitioner with respect to both Part 1 and Part 2 of the decommissioning plan, filed a “Motion to Compel and Request for Scheduling.” In that motion, Canton requested several documents relating to Parts 1 and 2 of the decommissioning plan (including the Part 2 plan that had recently been submitted to NRC). Canton also requested that it be accorded further time (90 to 120 days) to review the newly filed information and thereafter submit a response. It additionally requested that, following its response, the Presiding Officer reschedule this matter for a hearing.

On September 3, 2000, Molycorp responded to Canton’s August 31, 2000 motion, pointing out that there is no right to discovery in a Subpart L proceeding such as this one and seeking either summary dismissal of the motion or, alternatively, additional time to respond. On September 14, 2000, Canton filed a reply to Molycorp’s September 3 response to Canton’s August 31 motion. Further, on September 6, 2000, the City of Washington, Pennsylvania, an intervenor in the Temporary Storage proceeding that had not previously sought to participate in the decommissioning proceeding, filed a “Joinder to Motion to Compel and Request for Scheduling.”²

Because of the apparent confusion by the parties and petitioner of the procedural status of the decommissioning proceeding, the Presiding Officer convened the aforesaid telephone conference on September 19, 2000.

II. STATUS OF DECOMMISSIONING PROCEEDING

During the conference call, the Presiding Officer agreed to accept the Staff’s position that there were *two* separate proceedings governing the SDP, notwithstanding the apparent scope of the November 1999 Notice of Opportunity for Hearing: Part 1, noticed in November 1999, and Part 2, not yet noticed (Tr. 7). For a petitioner such as Canton to participate with respect to both parts of the decommissioning plan, therefore, it would have to file two separate hearing requests. The Presiding Officer accordingly agreed to rule on Canton’s hearing request as limited to Part 1 of the decommissioning plan.

At the request of Canton, the Staff agreed to notify Canton directly of the issuance of a Notice of Opportunity for Hearing for Part 2, so that Canton would not be required to search the *Federal Register* for such notice (Tr. 7). Canton was given 30 days from its receipt of the Staff communication, or the period of time permitted for response to the *Federal Register* notice (whichever is later), to submit its request for a hearing concerning Part 2 of the decommissioning plan (Tr. 21).

² Counsel for the City of Washington, Pennsylvania, was invited to participate in the call but was not able to do so.

III. DISCOVERY

In response to Canton's request to be provided with certain documents relevant to Parts 1 or 2 of the decommissioning plan, the Presiding Officer explained that there is no right of discovery in Subpart L proceedings but that, once a request for a hearing is granted, relevant documents will be provided to all parties by the Staff, in a Hearing File furnished in accord with 10 C.F.R. § 2.1231 (Tr. 14-15). The Presiding Officer also noted that copies of the subject matter of the hearing are made publicly available (at the NRC Public Document Room, and possibly elsewhere) no later than the time of publication of the Notice of Opportunity for Hearing, to enable Petitioners to address the requirements for obtaining a hearing (Tr. 16). Counsel for Molycorp pointed out that copies of both Part 1 and Part 2 of the decommissioning plan had been made available at Molycorp's office, and that copies of Part 1 had previously been provided to Canton. He noted that many (although not all) documents have been made available on the Internet. He offered to provide Canton a copy of Part 2 (Tr. 17, 25-26).³

IV. GRANT OF REQUEST FOR HEARING

Based on the Staff's expressed intent to treat Parts 1 and 2 of the decommissioning plan as separate proceedings, the Presiding Officer *granted* the request for a hearing of Canton in the Part-1 proceeding (Tr. 19-20). He noted that the same standing analysis as set forth in LBP-00-10 with respect to the Temporary Storage proceeding would also apply to the Part-1 decommissioning proceeding, and that several of the areas of concern — in particular, location and adequacy of the municipal water line and the effect of the plan on transport of radioactive materials through groundwater — were germane not only to the temporary storage proceeding but also to the Part-1 decommissioning proceeding. The Presiding Officer will issue a Notice of Hearing for the Part-1 proceeding in the near future.

V. CITY OF WASHINGTON MOTION

As noted above, the City of Washington sought to join Canton's Motion to Compel and Request for Scheduling. As indicated during the telephone conference (Tr. 33-34), Washington's motion must be *denied*. Washington has not thus far sought to become a party to the Part-1 decommissioning proceeding, nor has it heretofore sought to participate in that proceeding as an interested municipality

³ By hand-delivered letter of September 21, 2000 (a copy of which was sent to the Presiding Officer), counsel for Molycorp provided Canton with Part 2 (Revision dated July 14, 2000) of the decommissioning plan.

pursuant to 10 C.F.R. § 2.1211(b). To participate in the Part-1 decommissioning proceeding, Washington must file a late-filed petition for leave to intervene, or a request to participate under 10 C.F.R. § 2.1211(b). With respect to the Part-2 proceeding, Washington may, of course, file a request for a hearing, within the time frames set forth in the forthcoming *Federal Register* Notice of Opportunity for Hearing referenced above.

VI. HEARING FILE

At the request of the Staff, the hearing file for the Part-1 proceeding shall be submitted by the Staff, pursuant to 10 C.F.R. § 2.1231, 60 days from issuance of this Order granting Canton's request for a hearing on the Part-1 decommissioning plan (Tr. 36-37). Because of the division of the decommissioning proceeding into two parts, the hearing file need include only documents related to Part 1, although the Staff is free to include Part 2 documents to the extent it wishes. (To the extent a hearing may be granted with respect to Part 2, those documents would have to be made available on a schedule that would be set for that proceeding.)

VII. FURTHER PROCEEDINGS

As set forth during the conference call (Tr. 33-34), following submission by Canton of its revised areas of concern for the Part-1 proceeding, and comments by other parties on the litigability of those concerns, the Presiding Officer may wish to hold a prehearing conference in or near Washington, Pennsylvania, to determine which areas of concern are appropriate for litigation, to define litigable issues arising out of those areas of concern, and to determine schedules for later filings of the parties. If a conference is held, the Presiding Officer and Special Assistant would also appreciate a site tour. At the time of any such prehearing conference, the Presiding Officer would also plan to hear oral limited appearance statements, pursuant to 10 C.F.R. § 2.1211(a).

* * * *

For the reasons stated, it is, this 28th day of September 2000, ORDERED:

1. The request for a hearing filed by Canton Township, Pennsylvania, is hereby *granted* with respect to Part 1 of the decommissioning plan for Molycorp's Washington, Pennsylvania site. A Notice of Hearing for that proceeding will be issued in the near future.

2. Canton may file a revised statement of areas of concern for Part 1 of the decommissioning plan, taking into account information provided through the Staff's Safety Evaluation Report and Environmental Assessment, by no later than October 27, 2000.

3. Responses to Canton's revised areas of concern may be filed by the Licensee and NRC Staff by November 13, 2000.

4. The City of Washington's motion to join Canton's scheduling motion is hereby *denied*.

5. With respect to Part 2 of the decommissioning plan, Canton may file a request for a hearing within 30 days of its receipt from the Staff of a copy of the Notice of Opportunity for Hearing for Part 2, or within the time specified by such Notice, whichever is later. The filing time for parties' supplements, as set forth in LBP-00-10, is hereby *superseded*.

6. To the extent this Memorandum and Order grants Canton's request for a hearing concerning Part 1 of the decommissioning plan, it is subject to appeal to the Commission in accordance with the terms of 10 C.F.R. § 2.1205(o). Any appeal must be filed within ten (10) days of service of this Memorandum and Order. The appeal may be supported or opposed by any party by filing a counterstatement within fifteen (15) days of the service of the appeal brief.

Charles Bechhoefer, Presiding Officer
ADMINISTRATIVE JUDGE

Rockville, Maryland
September 28, 2000

[Copies of this Memorandum and Order have been e-mailed or telefaxed this date to counsel for each party.]

UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

COMMISSIONERS:

Richard A. Meserve, Chairman
Greta Joy Dicus
Nils J. Diaz
Edward McGaffigan, Jr.
Jeffrey S. Merrifield

In the Matter of

Docket No. 50-271-LT

**VERMONT YANKEE NUCLEAR
POWER CORPORATION and
AMERGEN VERMONT, LLC
(Vermont Yankee Nuclear Power
Station)**

October 6, 2000

The Commission finds that both CAN and the State of Vermont have shown standing to intervene in this license transfer proceeding. However, the Commission also concludes that neither CAN nor Vermont has proffered any admissible issues. The Commission therefore denies their petitions to intervene and requests for hearing. The Commission also denies CAN's motion for stay of the adjudication and its motion for a Subpart G proceeding.

LICENSE TRANSFER

To intervene as of right in any Commission licensing proceeding, a petitioner must demonstrate that its "interest may be affected by the proceeding," i.e., it must demonstrate "standing." *See* AEA § 189a, 42 U.S.C. § 2239(a). The Commission's rules for license transfer proceedings also require that a petition to intervene raise at least one admissible issue. *See* 10 C.F.R. § 2.1306.

LICENSE TRANSFER: STANDING

For a petitioner to demonstrate standing in a Subpart M license transfer proceeding, the petitioner must

- (1) identify an interest in the proceeding by
 - (a) alleging a concrete and particularized injury (actual or threatened) that
 - (b) is fairly traceable to, and may be affected by, the challenged action (the grant of an application), and
 - (c) is likely to be redressed by a favorable decision, and
 - (d) lies arguably within the “zone of interests” protected by the governing statute(s).
- (2) specify the facts pertaining to that interest.

See 10 C.F.R. §§ 2.1306, 2.1308; *Niagara Mohawk Power Corp.* (Nine Mile Point Nuclear Station, Units 1 and 2), CLI-99-30, 50 NRC 333, 340-41 & n.5 (1999) (and cited authority). Moreover, an organization that seeks representational standing must demonstrate how at least one of its members may be affected by the licensing action (as a result of the member’s activities on or near the site), must identify that member by name and address, and must show (preferably by affidavit) that the organization is authorized to request a hearing on behalf of that member. *See GPU Nuclear, Inc.* (Oyster Creek Nuclear Generating Station), CLI-00-6, 51 NRC 193, 202 (2000) (and authority cited therein).

LICENSE TRANSFER: STANDING

CAN seeks permission to represent the interests of one of its members who lives 6-6½ miles from the Vermont Yankee plant. On her behalf, CAN alleges injury from a Commission approval of the license transfer, seeks specific relief to preclude such injury, and asserts that the safety-related issues fall within the zone of interests protected by the AEA and the National Environmental Policy Act. The Commission recently granted standing in both the *Oyster Creek* and *Monticello/Prairie Island* license transfer proceedings to petitioners who (like CAN) raised similar assertions and who (again like CAN) sought to represent members living or active quite close to the site. As in these other proceedings, the Commission concludes that CAN has satisfied the agency’s standing requirements.

LICENSE TRANSFER: STANDING

Vermont explains that it is charged with representing the interest of the public in utility matters before certain regulatory agencies, including the NRC. Vermont’s duties include securing reliable and safe power. Further, although Vermont states that it takes no position as to whether the transfer should take place, it proffers

three issues related to the financial qualifications of AmerGen Vermont, asserts that the injuries associated with these issues fall within the zone of interests protected by the Atomic Energy Act, and requests specific relief that would preclude such injury. Vermont also provides an affidavit and other documents in support of its position on the three issues. Based on the above, the Commission finds that Vermont has demonstrated standing.

LICENSE TRANSFER: ADMISSIBILITY OF ISSUES

To demonstrate that issues are admissible under Subpart M, a petitioner must

- (1) set forth the issues (factual and/or legal) that petitioner seeks to raise,
- (2) demonstrate that those issues fall within the scope of the proceeding,
- (3) demonstrate that those issues are relevant and material to the findings necessary to a grant of the license transfer application,
- (4) show that a genuine dispute exists with the applicant regarding the issues, and
- (5) provide a concise statement of the alleged facts or expert opinions supporting petitioner's position on such issues, together with references to the sources and documents on which petitioner intends to rely.

See 10 C.F.R. § 2.1308; *Nine Mile Point*, CLI-99-30, 50 NRC at 342 (and cited authority). As the Commission stated recently in *Oyster Creek*, CLI-00-6, 51 NRC at 203 (citations omitted):

These standards do not allow mere "notice pleading;" the Commission will not accept "the filing of a vague, unparticularized" issue, unsupported by alleged fact or expert opinion and documentary support. General assertions or conclusions will not suffice. This is not to say that our threshold admissibility requirements should be turned into a "fortress to deny intervention." The Commission regularly continues to admit for litigation and hearing issues that are material and are adequately supported.

LICENSE TRANSFER: ADMISSIBILITY OF ISSUES

RULES OF PRACTICE: COLLATERAL ATTACK; WAIVER OF REGULATION

CAN alleges that Vermont Yankee's decommissioning will cost more than \$500 million rather than the Commission's formula-based estimate of \$328 million. Such general attacks on the agency's regulations and competence do not raise an admissible issue in this license transfer proceeding. Inasmuch as CAN's argument generally attacks our formula for estimating decommissioning costs, it constitutes an impermissible collateral attack on our regulations. "[A] petitioner in an individual adjudication cannot challenge generic decisions made by the Commission in rulemakings." See *North Atlantic Energy Service Corp.*

(Seabrook Station, Unit 1), CLI-99-6, 49 NRC 201, 217 n.8 (1999). Given that the agency has made a deliberate decision not to require Applicants to show site-specific cost estimates (*see id.*; Final Rule, “General Requirements for Decommissioning Nuclear Facilities,” 53 Fed. Reg. 24,018, 24,030-31 (June 27, 1988)), CAN is barred from challenging the Commission’s regulation’s cost formula on the basis of site-specific conditions, absent a waiver approved under 10 C.F.R. § 2.1329. Under 10 C.F.R. § 2.1329(a), (b), participants in the NRC hearing process may seek a waiver of regulations, but only upon a showing that, due to “special circumstances . . . application of [the] . . . regulation would not serve the purpose for which it was adopted.”

RULES OF PRACTICE: PRECEDENTIAL VALUE OF NRC STAFF ACTIONS

Prior NRC Staff actions are not binding on the Commission in adjudications.

**LICENSE TRANSFER: ADMISSIBILITY OF ISSUES;
DECOMMISSIONING EXPENSES**

**NEPA: ESTIMATE OF DECOMMISSIONING EXPENSES;
CATEGORICAL EXCLUSIONS**

RULES OF PRACTICE: WAIVER OF REGULATIONS

The Commission’s regulations do not require a license transfer applicant to provide an estimate of the actual decommissioning and site cleanup costs. The decommissioning funding regulation (10 C.F.R. § 50.75(c)) generically establishes the amount of decommissioning funds that must be set aside. The NRC’s decommissioning funding rule reflects a deliberate decision not to require site-specific estimates in setting decommissioning funding levels. CAN has not sought a waiver of that rule in this proceeding. *See* 10 C.F.R. § 2.1329; *Seabrook*, CLI-99-6, 49 NRC at 217 n.8. Nor has CAN reconciled its demand for a NEPA review with the regulatory “categorical exclusion” of license transfers from NEPA requirements. *See* 10 C.F.R. § 51.22(c)(21). The Commission therefore declines to admit this issue.

RULES OF PRACTICE: COLLATERAL ATTACK

LICENSE TRANSFER: DECOMMISSIONING EXPENSES

NEPA: ENVIRONMENTAL IMPACT STATEMENT

CAN seeks a NEPA review of the license transfer application on the ground that decommissioning technology is still in an experimental stage. This constitutes a collateral attack on 10 C.F.R. § 50.75(c) establishing the amount of decommissioning funds that must be set aside. The Commission therefore declines to admit this issue. It is also worth noting that the NRC rule that CAN attacks, 10 C.F.R. § 50.75(c), is in fact supported by a generic environmental impact statement. *See* Generic Environmental Impact Statement, NUREG-0586 (August 1988) (issued in conjunction with the promulgation of 10 C.F.R. §§ 50.75 and 50.82). *See generally* Final Rule, “General Requirements for Decommissioning Nuclear Facilities,” 53 Fed. Reg. 24,018, 24,051 (June 27, 1988).

NEPA: ENVIRONMENTAL IMPACT STATEMENT; CATEGORICAL EXCLUSIONS

LICENSE TRANSFER: ADMISSIBILITY OF ISSUES; ANTITRUST REVIEW

AEA: ANTITRUST EVALUATIONS OF LICENSE TRANSFER APPLICATIONS

ANTITRUST REVIEW

License transfers fall within a categorical exclusion for which EISs are not required. The fact that a particular license transfer may have antitrust implications does not remove it from the categorical exclusion. In any event, because the AEA does not require, and arguably does not even allow, the Commission to conduct antitrust evaluations of license transfer applications, our purported “failure” to conduct such an evaluation cannot constitute a federal action warranting a NEPA review. *See Kansas Gas and Electric Co.* (Wolf Creek Generating Station, Unit 1), CLI-99-19, 49 NRC 441 (1999); Final Rule, “Antitrust Review Authority: Clarification,” 65 Fed. Reg. 44,649 (July 19, 2000). The Commission therefore declines to admit this issue.

LICENSE TRANSFER: ADMISSIBILITY OF ISSUES; TECHNICAL QUALIFICATIONS

The Commission declines to admit CAN’s argument that the Vermont Yankee plant (together with others that AmerGen is buying) are older than any of

the BWR plants currently owned by AmerGen parent PECO renders AmerGen insufficiently experienced to maintain and operate BWRs. Those entities will neither own nor operate the Vermont Yankee plant, and AmerGen Vermont is not relying on technical personnel from either parent company to run the Vermont Yankee plant.

LICENSE TRANSFER: ADMISSIBILITY OF ISSUES; TECHNICAL QUALIFICATIONS

CAN expresses concern about AmerGen Vermont's ability to detect cracks and leaks, and asks the Commission to impose conditions on the transfer that would require AmerGen Vermont both to modify inspections and leak detection equipment and to institute programs to study the rate of crack propagation. In a related vein, CAN asks the Commission to oversee the development and implementation of systems and procedures necessary to provide objective review and ensure that the public health and safety are protected. These arguments address the adequacy of the plant's ongoing safety-related programs. The Commission rejects this issue. Operational issues of this kind will remain the same whether or not the license is transferred. The Commission has indicated that a license transfer hearing is not the proper forum in which to conduct a full-scale health-and-safety review of a plant. *See Oyster Creek*, CLI-00-6, 51 NRC at 213, 214.

LICENSE TRANSFER: ADMISSIBILITY OF ISSUES; TECHNICAL QUALIFICATIONS

CAN argues that, with a tightly packed maintenance schedule and a depleted workforce, AmerGen (AmerGen Vermont's parent corporation) will not have the flexibility to react quickly to surprises at its various generating plants. To remedy this perceived problem, CAN asks the Commission to require special training as a condition for its approval of the transfer. However, CAN fails to specify who should receive training or what kind of training is needed. CAN has thus failed to demonstrate that a genuine dispute exists, with requisite specificity, on this basis.

LICENSE TRANSFER: ADMISSIBILITY OF ISSUES; TECHNICAL QUALIFICATIONS

The Commission is concerned with management integrity. However, CAN has offered no hard facts or expert opinion in support of its "management integrity" issue, and has failed to impeach the commitment in the application that the plant staff, including senior plant managers, would remain substantially unchanged. Speculation about chilling effects and demoralization of the workforce does not

suffice to trigger the Commission's hearing process. *See Oyster Creek*, CLI-00-6, 51 NRC at 203, 209-10. *See also id.* at 214 ("the Commission is interested in whether the plant poses a risk to the public health and safety, and so long as personnel decisions do not impose that risk, our regulations and policy do not preclude a licensee from reducing or replacing portions of its staff"). Nor do poorly documented claims of staffing deficiencies at *other* nuclear facilities owned by AmerGen call for a hearing on Vermont Yankee's transfer. For these reasons, the Commission declines to admit this issue.

LICENSE TRANSFER: ADMISSIBILITY OF ISSUES; NRC STAFF COMPETENCE

CAN argues that, given the historical oversight problems in NRC Region I, an independent evaluation of the Vermont Yankee nuclear generating station is required before any license transfer application can proceed. An inquiry such as the one CAN advocates would go considerably beyond the scope of the Commission's inquiry in this proceeding, i.e., AmerGen Vermont's qualifications to own and operate the Vermont Yankee plant. CAN does not explain how any action taken with respect to this license transfer, whether it be denial of the license or the imposition of conditions on the transferee, could remedy CAN's broad complaints that NRC's Region I has abdicated its oversight responsibilities. For these reasons, the Commission declines to admit this issue.

LICENSE TRANSFER: ADMISSIBILITY OF ISSUES; FINANCIAL QUALIFICATIONS

CAN argues that the Vermont Yankee plant is in an advanced state of deterioration, and faces such problems as a lack of fuel storage capacity that will cause the operating expenses to increase over current levels. CAN therefore asks the Commission to hold a hearing to determine the actual costs of operating the facility, including proper maintenance and fuel storage. However, CAN fails to support its position with expert opinion, documentation, or specific facts. *See Oyster Creek*, CLI-00-6, *supra*. The Commission therefore declines to admit this issue.

RULES OF PRACTICE: GLOBAL ISSUES

LICENSE TRANSFER: ADMISSIBILITY OF ISSUES; FINANCIAL QUALIFICATIONS

CAN argues that the Commission's current regulatory process for reviewing and approving power plant license transfers never contemplated — and is ill-

suit to address — an applicant seeking to acquire 100 plants in North America. According to CAN, the existing Commission review process permits AmerGen to segment the regulatory review of its purchases on a plant-by-plant basis, and thereby precludes the Commission from considering the accumulated risks of AmerGen's attempt to buy and operate so large a fleet of reactors. Such a piecemeal approach, CAN continues, violates the letter and spirit of both the AEA and NEPA. For this reason, CAN asks that the Commission broaden the scope of this proceeding to include the ramifications of AmerGen's desired centralization of nuclear power generating capacity, along with the parallel issues of impacts upon the human and natural environment, and the health and safety effects of such a potential concentration of responsibility. More specifically, CAN is concerned that AmerGen will have insufficient finances and expertise to deal with unscheduled outages, costly repairs, and untimely shutdowns occurring simultaneously at many plants.

The Commission declines to grant this request. Such an inquiry would go well beyond the scope of the proceeding — which is limited to the appropriateness of the proposed Vermont Yankee license transfer. Nothing in CAN's petition supports conducting an adjudicatory hearing on the matter in the context of the proposed Vermont Yankee transfer. While CAN raises a purely theoretical concern about PECO and British Energy owning an unprecedented number of facilities, predictions about future acquisitions are purely speculative and the fact remains that the potential acquisition of Vermont Yankee will not cause them to approach a level of plant ownership that is unprecedented. For example, it is a matter of public record that Commonwealth Edison has owned more than a dozen plants for a lengthy period of time. This is not to say, however, that the Commission is unconcerned about the effects of consolidating "fleets" of reactors under one owner. In fact, the NRC Staff is currently conducting a study on the policy implications of industry consolidation. *See* COMNJD-99-06 (Feb. 10, 2000) (released to the public on Feb. 11, 2000).

LICENSE TRANSFER: ADMISSIBILITY OF ISSUES; FINANCIAL QUALIFICATIONS

The limited liability nature of LLCs does not preclude them from owning and operating nuclear power plants. *See Oyster Creek*, 51 NRC at 208 (ruling that limited liability companies are no different from corporations in that both are legally structured to limit the liability of their shareholders, and that the Commission has issued reactor licenses to such limited liability organizations for decades); *accord Monticello*, CLI-00-14, 52 NRC at 57. Moreover, as the Commission has previously stated (in *Seabrook*, CLI-99-6, 49 NRC at 222):

[W]e cannot accede to [Petitioner's] seeming view that [the proposed transferee] inherently cannot meet our financial qualification rules because its rates are not regulated by a state utilities commission. This view runs counter to the premise underlying the entire restructuring and economic deregulation of the electric utility industry, i.e., that the marketplace will replace cost-of-service ratemaking. In our view, unregulated electricity rates are not incompatible with maintaining sufficient financial resources to operate a nuclear power reactor.

**LICENSE TRANSFER: FINANCIAL QUALIFICATIONS;
ADMISSIBILITY OF ISSUES**

RULES OF PRACTICE: GLOBAL ISSUES

CAN considers the mere administrative formality of a Subpart M license transfer process ill-equipped to evaluate adequately the effects of industry consolidation and limited liability companies, and therefore recommends that the Commission suspend all license transfer proceedings involving AmerGen until NRC has established the necessary criteria to make such evaluations. We see no immediate threats to public health and safety requiring such a drastic course of action. Notably, a fleet of three (and soon, four) operating plants (i.e., units) owned by AmerGen and its family of companies is not out-of-the-ordinary when compared with the holdings of other nuclear utilities — either currently or historically. For instance, Commonwealth Edison has, for quite some time, held an ownership interest in 12.5 plants. Similarly, Entergy currently owns 5.9 plants (3.9 being long-term holdings), Duke 5.3 (all long-term holdings), and PECO 4.7 plants (again, all long-term holdings).

**LICENSE TRANSFER: ADMISSIBILITY OF ISSUES; ANTITRUST
REVIEW**

ANTITRUST REVIEW

The Commission no longer conducts antitrust reviews of license transfer applications. See Final Rule, “Antitrust Review Authority: Clarification,” 65 Fed. Reg. 44,649 (July 19, 2000); *Kansas Gas and Electric Co.* (Wolf Creek Generating Station, Unit 1), CLI-99-19, 49 NRC 441 (1999).

**LICENSE TRANSFER: FINANCIAL QUALIFICATIONS;
ADMISSIBILITY OF ISSUES**

The parent company financial guarantee is supplemental information and not material to the financial qualifications determination under 10 C.F.R. § 50.33(f)(2). See *Oyster Creek*, CLI-00-6, 51 NRC at 205.

LICENSE TRANSFER: PRICE-ANDERSON ACT

PRICE-ANDERSON ACT: LICENSE TRANSFER

Price-Anderson indemnification agreements continue in effect even after plants have ceased permanent operation and are engaged in decommissioning. *See* 10 C.F.R. § 140.92 (NRC Indemnification Agreement, art. VII); 10 C.F.R. § 50.54(w).

LICENSE TRANSFER: ADMISSIBILITY OF ISSUES; FINANCIAL QUALIFICATIONS

As we ruled in *Oyster Creek*, a license transfer applicant satisfies our financial qualifications rule if it provides a cost-and-revenue projection for the first 5 years of operation that predicts sufficient revenue to cover operating costs. *See* 51 NRC at 206-08. However, we have also held that where a petitioner raises a genuine issue about the accuracy or plausibility of an applicant's cost-and-revenue projection, the petitioner is entitled to a hearing. *See Seabrook*, 49 NRC at 220-21. Inconsistencies and unexplained assertions in Vermont's supporting affidavit defeat Vermont's claim that it has raised a genuine dispute of fact or law requiring a hearing on financial qualifications.

LICENSE TRANSFER: ADMISSIBILITY OF ISSUES; FINANCIAL QUALIFICATIONS

The Commission finds no support in Vermont's filings for the assumption of its expert (Mr. Sherman) that the costs of outages at other plants would cause AmerGen to consume its \$110 (now \$200) million supplemental fund, leaving the Vermont Yankee facility underfunded. Vermont made no effort to show that the operating revenue at those other plants could not cover some or all of the costs of such an outage. Moreover, the Sherman affidavit addresses the original \$110 million supplemental fund only. Vermont has made no effort to supplement its pleadings to claim inadequacy of what is now a \$200 million commitment. Nor does Vermont offer any reason to question AmerGen's more general commitment to provide such funds as are necessary to meet ongoing expenses or to maintain safety. As we have held, in any event, absent a demonstrated shortfall in the revenue predictions required by 10 C.F.R. § 50.33(f), the adequacy of a corporate parent's supplemental commitment is not material to our license transfer decision. *See Oyster Creek*, CLI-00-6, 51 NRC at 205.

LICENSE TRANSFER: ADMISSIBILITY OF ISSUES; FINANCIAL QUALIFICATIONS; PRICE-ANDERSON ACT

PRICE-ANDERSON ACT: LICENSE TRANSFER

Vermont's argument that the applicant must meet financial requirements in addition to those imposed by our regulations constitutes an impermissible attack on our regulations. Moreover, prior to issuance of the amended license, AmerGen Vermont must obtain all regulatorily required property damage insurance.

MEMORANDUM AND ORDER

This proceeding involves an application for a direct license transfer of the Vermont Yankee Nuclear Power Station from Vermont Yankee Nuclear Power Corporation ("Vermont Yankee") to AmerGen Vermont, LLC ("AmerGen Vermont"). Vermont Yankee and AmerGen Vermont jointly seek NRC approval of the transfer pursuant to section 184 of the Atomic Energy Act of 1954 ("AEA")¹ and section 50.80 of the Commission's regulations.²

The application, dated January 6, 2000, seeks authorization for the transfer of both ownership and operation of the Vermont Yankee Nuclear Power Station. The proposed owner and operator would be AmerGen Vermont, a wholly owned subsidiary of AmerGen Energy Company, LLC ("AmerGen"), which is in turn owned in equal shares by PECO Energy Company ("PECO") and British Energy, Inc. (a wholly owned subsidiary of British Energy plc). *See* Application at 2-3. Under the proposed transfer, AmerGen Vermont would take title to the facility and would assume responsibility for operation, maintenance, and eventual decommissioning of the facility. The Applicants propose no physical or operational changes, and represent that substantially all of the plant's current operation and maintenance personnel would assume similar roles under the new management. *Id.* at 4, 16-17. On February 3, 2000, the Commission published a notice of this application in the *Federal Register*. *See* 65 Fed. Reg. 5376.

The Vermont Department of Public Service ("Vermont") seeks intervention and a hearing, but takes no position as to whether the transfer should take place. In the event Vermont is not admitted as an intervenor, it seeks participant status in a manner similar to that accorded in the Commission's Subpart G proceedings

¹ 42 U.S.C. § 2234 (precluding the transfer of any NRC license unless the Commission both finds the transfer in accordance with the AEA and gives its consent in writing).

² 10 C.F.R. § 50.80. This regulation reiterates the requirements of AEA § 184, sets forth the filing requirements for a license transfer application, and establishes the following test for approval of such an application: (1) the proposed transferee is qualified to hold the license and (2) the transfer is otherwise consistent with law, regulations, and Commission orders.

pursuant to 10 C.F.R. § 2.715(c). *See* Vermont’s Petition, dated Feb. 23, 2000, at 1, 2.

The Citizens Awareness Network (“CAN”) likewise seeks intervention and a hearing in which to oppose the application. CAN supplements this request with a motion, filed pursuant to 10 C.F.R. § 2.1329(b), that any hearing be conducted under the Commission’s formal hearing regulations (Subpart G) rather than under the Subpart M procedures that normally apply to license transfer adjudications. *See* CAN’s Petition, dated Feb. 22, 2000, at 3-4, 13-14. CAN also requests that the Commission stay the instant proceeding pending a decision of the Vermont Public Service Board addressing the applications of Vermont Yankee and certain other corporations for a “certificate of public good” and determining whether the sale to AmerGen Vermont is “prudent, used and useful.” *Id.* at 1-2. In the alternative, CAN seeks a stay until the Vermont Public Service Board rules on pending motions to dismiss the state proceeding for lack of jurisdiction. In a similar vein, CAN requests that the Commission deny or defer AmerGen’s application until the Internal Revenue Service has responded to AmerGen’s private letter ruling request regarding the tax consequences of acquiring the decommissioning trust funds for Vermont Yankee and other plants. *Id.* at 10-11.

The Applicants filed answers to these petitions and requests pursuant to 10 C.F.R. § 2.1307(a). The Applicants assert that CAN lacks standing and that neither CAN nor Vermont has proffered admissible issues. CAN (but not Vermont) filed a reply pursuant to 10 C.F.R. § 2.1307(b). The NRC Staff is not participating as a party in the adjudicatory portion of this proceeding. *See generally* 10 C.F.R. § 2.1316(b), (c). *See also Vermont Yankee Nuclear Power Corp.* (Vermont Yankee Nuclear Power Station), CLI-00-17, 52 NRC 79, 81 n.1 (2000). On July 7, 2000, the Staff issued an order approving the license transfer, subject to fourteen conditions, but also indicating that the Commission’s independent review of the two petitions to intervene and requests for hearing was still pending.

For the reasons set forth below, we find that both CAN and Vermont have shown standing, but conclude that neither has proffered any admissible issues. We therefore deny CAN’s and Vermont’s petitions to intervene and requests for hearing. We deny CAN’s motion for stay of the adjudication as moot and its motion for a Subpart G proceeding as both moot and impermissible. *See* 10 C.F.R. § 2.1322(d).

I. DISCUSSION

To intervene as of right in any Commission licensing proceeding, a petitioner must demonstrate that its “interest may be affected by the proceeding,” i.e., it must demonstrate “standing.” *See* AEA § 189a, 42 U.S.C. § 2239(a). The

Commission's rules for license transfer proceedings also require that a petition to intervene raise at least one admissible issue. *See* 10 C.F.R. § 2.1306.

A. Standing

For a petitioner to demonstrate standing in a Subpart M license transfer proceeding, the petitioner must

- (1) identify an interest in the proceeding by
 - (a) alleging a concrete and particularized injury (actual or threatened) that
 - (b) is fairly traceable to, and may be affected by, the challenged action (the grant of an application), and
 - (c) is likely to be redressed by a favorable decision, and
 - (d) lies arguably within the "zone of interests" protected by the governing statute(s).
- (2) specify the facts pertaining to that interest.

See 10 C.F.R. §§ 2.1306, 2.1308; *Niagara Mohawk Power Corp.* (Nine Mile Point Nuclear Station, Units 1 and 2), CLI-99-30, 50 NRC 333, 340-41 & n.5 (1999) (and cited authority). Moreover, an organization (such as CAN) that seeks representational standing must demonstrate how at least one of its members may be affected by the licensing action (as a result of the member's activities on or near the site), must identify that member by name and address, and must show (preferably by affidavit) that the organization is authorized to request a hearing on behalf of that member. *See GPU Nuclear, Inc.* (Oyster Creek Nuclear Generating Station), CLI-00-6, 51 NRC 193, 202 (2000) (and authority cited therein).

CAN seeks permission to represent the interests of one of its members, Ms. Anne Britton, who lives 6-6½ miles from the Vermont Yankee plant. *See* Declaration of Anne Britton in Support of CAN's Standing, dated Feb. 18, 2000, at 1, appended to CAN Petition as Exhibit 1. On her behalf, CAN alleges injury from a Commission approval of the license transfer,³ seeks specific relief to preclude such injury,⁴ and asserts that the safety-related issues fall within the zone of interests protected by the AEA and the National Environmental Policy Act ("NEPA"). We recently granted standing in both the *Oyster Creek* and *Monticello/Prairie Island* license transfer proceedings to petitioners who (like

³Ms. Britton alleges in her affidavit that the license transfer would adversely affect her interests in two ways that the Commission recognizes as supportive of standing. As a person living near the plant, she may incur radiation dangers if, as a result of the transfer, the plant operates unsafely. She would also like to walk and hike in the area of the facility after it is decommissioned and therefore claims an interest in sufficient funding being set aside for the decommissioning to be properly performed. *See also* CAN's Reply, dated March 10, 2000, at 10-11.

⁴Specifically, CAN asks that the Commission deny the application and also that the Commission impose conditions controlling the working hours and overtime of employees, establishing parameters for handling and accumulating adequate decommissioning funds, requiring additional training, requiring a full-scale engineering review of the plant prior to any approval of the transfer, and conducting a study to preserve institutional memory concerning spills, contamination, and other decommissioning and site cleanup-related matters. *See* CAN's Petition at 13, 17, 20-21, 25, 26, 29, 31-32, 36, 38-39, 44, 51-52, 53-54.

CAN) raised similar assertions and who (again like CAN) sought to represent members living or active quite close to the site.⁵ As in these other proceedings, we conclude that CAN has satisfied our standing requirements.

Vermont explains that it is charged with representing the interest of the public in utility matters before certain regulatory agencies, including the NRC. Vermont's duties include securing reliable and safe power. *See* Vermont's Petition at 3. Further, although Vermont states that it takes no position as to whether the transfer should take place, it proffers three issues related to the financial qualifications of AmerGen Vermont, asserts that the injuries associated with these issues fall within the zone of interests protected by the Atomic Energy Act, and requests specific relief that would preclude such injury. Vermont also provides an affidavit and other documents in support of its position on the three issues. *See* Vermont's Petition at 2-3. Based on the above, we find that Vermont has demonstrated standing.

B. Admissibility of Issues

To demonstrate that issues are admissible under Subpart M, a petitioner must

- (1) set forth the issues (factual and/or legal) that petitioner seeks to raise,
- (2) demonstrate that those issues fall within the scope of the proceeding,
- (3) demonstrate that those issues are relevant and material to the findings necessary to a grant of the license transfer application,
- (4) show that a genuine dispute exists with the applicant regarding the issues, and
- (5) provide a concise statement of the alleged facts or expert opinions supporting petitioner's position on such issues, together with references to the sources and documents on which petitioner intends to rely.

See 10 C.F.R. § 2.1308; *Nine Mile Point*, CLI-99-30, 50 NRC at 342 (and cited authority). As we stated recently in *Oyster Creek*:

These standards do not allow mere "notice pleading;" the Commission will not accept "the filing of a vague, unparticularized" issue, unsupported by alleged fact or expert opinion and documentary support. General assertions or conclusions will not suffice. This is not to say that our threshold admissibility requirements should be turned into a "fortress to deny intervention." The Commission regularly continues to admit for litigation and hearing issues that are material and are adequately supported.

CLI-00-6, 51 NRC at 203 (citations omitted).

⁵ *See Oyster Creek*, CLI-00-6, 51 NRC at 202-03; *Northern States Power Co.* (Monticello Nuclear Generating Plant; Prairie Island Nuclear Generating Plant, Units 1 and 2; Prairie Island Independent Spent Fuel Storage Installation), CLI-00-14, 52 NRC 37, 47 (2000).

1. Assurance of Decommissioning Funds

CAN Issue 1A: “The application for license transfer should be denied because the application does not provide sufficient assurance of adequate funding for the eventual and actual costs of decommissioning” the plant. *See* CAN’s Petition at 11.

In the application, Vermont Yankee commits to transferring to AmerGen Vermont a decommissioning fund totaling \$280 million. *See* Application at 5. To make sure this happens, the NRC Staff has conditioned its approval of the transfer upon “AmerGen Vermont . . . provid[ing] decommissioning funding assurance of no less than \$280 million after payment of . . . taxes.” *See* Staff Order, dated July 7, 2000, at 4 (Condition 2). *See also* Safety Evaluation Report (“SER”) at 3. Using a 2% rate of return, as permitted by our regulations, the decommissioning fund would exceed \$358 million by the expected time of decommissioning. *See* 10 C.F.R. § 50.75(e)(1)(i); Application at 25-26 and Enclosure 12.

Applicants correctly point out that this amount exceeds by \$30 million the decommissioning cost estimate (\$328 million), as calculated by the formula at 10 C.F.R. § 50.75(c). *See* Application at 25. In addition, AmerGen Vermont commits to providing “additional contributions to the [decommissioning] trust funds or [to] provide an alternative form of decommissioning funding assurance sufficient to meet NRC’s requirements under the regulations.” *See* Application at 26. Finally, in the event that the plant closes prematurely, AmerGen Vermont commits to delaying the plant’s decommissioning until about 2007 when it would have accumulated sufficient funds to cover those costs. *See* AmerGen Vermont’s Response to Request for Additional Information, dated March 30, 2000, at 2 (RAI Question No. 2).

CAN argues that the current cost estimates for decommissioning Vermont Yankee “do not reflect the costs required to meet Nuclear Regulatory Commission regulations for site remediation standards” (*see* CAN’s Petition at 11), but CAN neither challenges the accuracy of AmerGen Vermont’s calculations nor addresses its additional guarantee. It instead relies on a General Accounting Office (“GAO”) Report generally concluding that many nuclear facilities do not have sufficient funds to cover future decommissioning costs as estimated under the Commission’s current regulations. The GAO report, according to CAN, also criticized the NRC’s supposed lack of both “thresholds for acceptable levels of financial assurances” and “mechanisms for responding to the risks caused by unacceptable levels of funding,” as well as deficiencies in the agency’s oversight of financial assurances for decommissioning nuclear power facilities. *See* CAN’s Petition at 12. CAN points to nothing in the GAO report, however, that specifically addresses the Vermont Yankee plant.

CAN’s general attacks on the agency’s regulations and competence do not raise an admissible issue in this license transfer proceeding. Inasmuch as CAN’s argument generally attacks our formula for estimating decommissioning costs, it

constitutes an impermissible collateral attack on our regulations. As we explained in an earlier license transfer proceeding, “a petitioner in an individual adjudication cannot challenge generic decisions made by the Commission in rulemakings.” *See North Atlantic Energy Service Corp. (Seabrook Station, Unit 1)*, CLI-99-6, 49 NRC 201, 217 n.8 (1999). Given that the agency has made a deliberate decision not to require Applicants to show site-specific cost estimates,⁶ CAN is barred from challenging our regulation’s cost formula on the basis of site-specific conditions (i.e., CAN’s allegation that Vermont Yankee’s decommissioning will cost more than \$500 million rather than the Commission’s formula-based estimate of \$328 million) absent a waiver approved under 10 C.F.R. § 2.1329.⁷

CAN also points to a declaration of a Union of Concerned Scientists official, David Lochbaum, in support of its claim of inadequate decommissioning funding. *See CAN’s Petition* at 13. But Mr. Lochbaum’s affidavit does not discuss CAN’s inadequate funding claim. Mr. Lochbaum’s concerns relate instead to alleged staffing reductions, deficient Price-Anderson Act coverage, and loss of institutional memory at Vermont Yankee. We return to Mr. Lochbaum’s concerns below, but it suffices to say here that Mr. Lochbaum’s declaration provides no basis for admitting CAN’s Issue 1A.⁸

2. *Need for an Environmental Impact Statement*

In Issues 1B, 3, and 6, CAN calls for the Commission to prepare an environmental impact statement (“EIS”).

CAN Issue 1B: “The NRC must [prepare] an EIS to determine the level of contamination on and off the . . . site to fully determine the level of contamination at [the site], and, in turn, to establish the appropriate level of funding necessary for AmerGen [Vermont] to meet NRC site release criteria.” *See CAN’s Petition* at 14.

CAN argues that NRC is required under NEPA to prepare an EIS to set a level of decommissioning costs uniquely tailored to conditions at the Vermont Yankee plant. CAN contends that site-specific conditions, such as the history of spills and waste disposal at the site, must be assessed. According to CAN,

⁶ *See* Final Rule, “General Requirements for Decommissioning Nuclear Facilities,” 53 Fed. Reg. 24,018, 24,030-31 (June 27, 1988); *Seabrook*, CLI-99-6, 49 NRC at 217 n.8.

⁷ Under 10 C.F.R. § 2.1329(a), (b), participants in the NRC hearing process may seek a waiver of regulations, but only upon a showing that, due to “special circumstances . . . application of [the] . . . regulation would not serve the purpose for which it was adopted.”

⁸ In defending the propriety of their license transfer arrangements, including their handling of decommissioning funding, Applicants repeatedly invoke as “precedents” prior NRC Staff actions approving allegedly analogous transactions. Prior NRC Staff actions, however, are not binding on the Commission in adjudications.

the request for a site specific EIS to ascertain the existence of undocumented radioactive waste, groundwater contamination, and the potential affects [*sic*] of leakage from the rad waste system is necessary. Without such a detailed study, no current or future owner can develop an accurate estimate for actual decommissioning and site cleanup costs. Without such a study, the NRC cannot possibly know [*sic*] whether AmerGen's estimates of such costs, and its claims related to the availability of funding to meet such costs, will be adequate to assure that occupational and public health and safety will be protected under the proposed license transfer.

See CAN's Reply at 14. CAN also argues that the field of nuclear reactor decommissioning is still in an "experimental" stage, where actual costs can far exceed NRC cost estimates as reflected in our regulations.

CAN's "NEPA" issue amounts to another effort to litigate site-specific decommissioning cost estimates. CAN's position rests on the assumption that our regulations require AmerGen Vermont, in its license transfer application, to provide an estimate of the actual decommissioning and site cleanup costs. As explained in the previous section of this Order, our regulations impose no such requirement. Our decommissioning funding regulation (10 C.F.R. § 50.75(c)) generically establishes the amount of decommissioning funds that must be set aside.⁹ As noted above, the NRC's decommissioning funding rule reflects a deliberate decision not to require site-specific estimates in setting decommissioning funding levels. CAN has not sought a waiver of that rule in this proceeding. See 10 C.F.R. § 2.1329, *supra* note 7; *Seabrook*, CLI-99-6, 49 NRC at 217 n.8. Nor has CAN reconciled its demand for a NEPA review with our rules' "categorical exclusion" of license transfers from NEPA requirements. See 10 C.F.R. § 51.22(c)(21).¹⁰

CAN Issue 6. CAN argues in support of its Issue 6 (*see* p. 174, *infra*) that the Commission's "failure" to conduct an antitrust evaluation during a "period of rapid consolidation of nuclear reactor holdings under giant, partly foreign controlled mega-corporations is . . . a major action affecting the quality of the human and natural environment" and therefore requires the preparation of an EIS. See CAN's Petition at 49. See also CAN's Reply at 14.

As noted above, license transfers fall within a categorical exclusion for which EISs are not required. The fact that a particular license transfer may have

⁹ CAN's supporting argument that decommissioning technology is still in an experimental stage fails for the same reason, i.e., it is a collateral attack on 10 C.F.R. § 50.75(c) establishing the amount of decommissioning funds that must be set aside. It is worth noting in this connection that the NRC rule that CAN attacks, 10 C.F.R. § 50.75(c), is in fact supported by a generic environmental impact statement. See Generic Environmental Impact Statement, NUREG-0586 (August 1988) (issued in conjunction with the promulgation of 10 C.F.R. §§ 50.75 and 50.82). See generally Final Rule, "General Requirements for Decommissioning Nuclear Facilities," 53 Fed. Reg. 24,018, 24,051 (June 27, 1988).

¹⁰ For the same reasons as set forth in our discussion of Issue 1B, we decline to admit CAN's Issue 3: "Given the historical problems at the Vermont Yankee nuclear generating station, CAN believes that an Environmental Impact Study is warranted before the license transfer application is approved to protect the health and safety of the workers and the public." See CAN's Petition at 32.

antitrust implications does not remove it from the categorical exclusion. In any event, because the AEA does not require, and arguably does not even allow, the Commission to conduct antitrust evaluations of license transfer applications,¹¹ our purported “failure” to conduct such an evaluation cannot constitute a federal action warranting a NEPA review.

3. *AmerGen Vermont’s Technical Qualifications*

CAN Issue 2A: “AmerGen [Vermont] lacks experience managing aging BWRs [boiling water reactors] such as [the Vermont Yankee plant] — which lack will place CAN members at risk due to an accident at [the Vermont Yankee plant].” See CAN’s Petition at 17.

CAN expresses several general concerns regarding AmerGen Vermont’s ability to operate the Vermont Yankee plant safely. CAN initially notes that the plant (together with others that AmerGen is buying) is older than any of the BWR plants currently owned by AmerGen parent PECO. See CAN’s Petition at 17-18. CAN concludes from this fact that AmerGen lacks the necessary experience to maintain and operate BWRs. This argument’s focus on AmerGen and PECO (AmerGen Vermont’s parent and grandparent corporations, respectively) is misplaced, as those entities will neither own nor operate the Vermont Yankee plant, and AmerGen Vermont is not relying on technical personnel from either parent company to run the Vermont Yankee plant.

The application represents that essentially the same personnel (including senior plant managers) who have maintained and operated the Vermont Yankee plant will continue to do so under the new ownership.¹² CAN does not challenge that representation. Indeed, the “Technical Qualifications” section of AmerGen Vermont’s application relies on only two categories of personnel who are not already part of the plant’s staff: corporate-level management and certain AmerGen personnel or contractors who will provide technical support currently provided

¹¹ See *Kansas Gas and Electric Co.* (Wolf Creek Generating Station, Unit 1), CLI-99-19, 49 NRC 441 (1999); Final Rule, “Antitrust Review Authority: Clarification,” 65 Fed. Reg. 44,649 (July 19, 2000).

¹² See, e.g., Application at 16-18:

The existing [Vermont Yankee] nuclear organization at the Vermont Yankee site will be transferred to AmerGen Vermont, and substantially all of [Vermont Yankee]’s nuclear employees at the Vermont Yankee site involved in the operation and maintenance of the plant will assume similar roles and responsibilities for AmerGen Vermont as of that date. The unions which currently represent employees at the Vermont Yankee site will continue to be recognized. Personnel assigned to Vermont Yankee will . . . be responsible to the management of AmerGen Vermont and the AmerGen Vermont Management Committee. [Application at 16-17.]

The plant staff, including senior managers, will be substantially unchanged. [Application at 17.]

[M]ost engineering support for Vermont Yankee is currently provided by a dedicated engineering organization that will continue as an integral part of the Vermont Yankee site organization. [Application at 18.]

by offsite personnel.¹³ Given that CAN questions the technical qualifications of neither group, we see no basis for a hearing on their technical qualifications.

CAN expresses particular concern about AmerGen Vermont's ability to detect cracks and leaks. Consequently, it asks the Commission to impose conditions on the transfer that would require AmerGen Vermont "to modify inspections and leak detection equipment" and "to institute programs to study the rate of crack propagation." See CAN's Petition at 19. In a related vein, CAN also asks the Commission "to oversee the development and implementation of systems and procedures necessary to provide objective review and ensure that the public health and safety is protected." *Id.* These arguments address the adequacy of the plant's ongoing safety-related programs. Operational issues of this kind will remain the same whether or not the license is transferred. The Commission has indicated that a license transfer hearing is not the proper forum in which to conduct a full-scale health-and-safety review of a plant.¹⁴

CAN also argues that, with a tightly packed maintenance schedule and a depleted workforce, AmerGen (AmerGen Vermont's parent corporation) will not have the flexibility to react quickly to surprises at its various generating plants.¹⁵ To remedy this perceived problem, CAN asks the Commission to require special training as a condition for its approval of the transfer. See CAN's Petition at 20. But CAN fails to specify who should receive training or what kind of training is needed. CAN has thus failed to demonstrate that a genuine dispute exists, with requisite specificity, on this basis.

CAN next raises a general argument regarding the effect that a change of management culture and philosophy may have on the willingness of employees to raise health-and-safety issues:

Given the pattern of AmerGen's actions at its newly acquired reactor facilities, and those of AmerGen's parent companies, BE and PECO who will set the tone, style, and strategy for management, once the license is transferred, a substantial change in the workforce will be on the horizon. This is a change which will have a chilling effect on workers' abilities to raise health and safety issues to management. When a workforce is in flux and uncertain about who

¹³ See Application at 16, 18:

Most of the Management Committee members and principal executives and officers of AmerGen Vermont currently serve as Management Committee members of AmerGen. [Application at 16.]

The existing [Vermont Yankee] technical support for the plant, which are not currently assigned to the Vermont Yankee site, will either continue to perform these functions on behalf of AmerGen Vermont or transfer their functions to AmerGen or contractors who will meet existing FSAR [Final Safety Analysis Report] technical support requirements for these functions. [Application at 18.]

¹⁴ "A license transfer proceeding is not a forum for a full review of all aspects of current plant operation." See *Oyster Creek*, CLI-00-6, 51 NRC at 213, 214. We also note that CAN provides no details as to the specific kinds of conditions or oversight it seeks. CAN may, of course, file a petition for Staff enforcement action pursuant to 10 C.F.R. § 2.206 if it is concerned about current safety issues at Vermont Yankee.

¹⁵ See CAN's Petition at 20. See also *id.* at 23 (arguing that AmerGen's schedule of 6-month outages per plant ignores the fact that outages are often triggered by unplanned events). Apparently, CAN here *does* intend to refer to AmerGen rather than AmerGen Vermont, which owns only the Vermont Yankee plant.

will have a job tomorrow, workers who raise safety-conscious, but not cost-effective, concerns will be in fear of losing their jobs. Such effects . . . allow[] increasingly dangerous conditions at [the Vermont Yankee plant]

See CAN's Reply at 15.

We are of course concerned with management integrity. But CAN offers no hard facts or expert opinion in support of its issue, and fails to impeach the commitment in the application that the plant staff, including senior plant managers, would remain substantially unchanged. Speculation about chilling effects and demoralization of the workforce does not suffice to trigger our hearing process.¹⁶ Nor do poorly documented claims of staffing deficiencies at other nuclear facilities owned by AmerGen call for a hearing on Vermont Yankee's transfer. See *Oyster Creek*, 51 NRC at 209-10.

We see nothing in CAN's petition sufficient to suggest that CAN's concerns about technical qualifications, or about management integrity and chilling effects, are sufficiently tangible and credible that they raise a genuine issue of dispute within the meaning of 10 C.F.R. § 2.1308 on which we should obtain further evidence or testimony at an NRC hearing. We therefore find CAN's Issue 2A inadmissible.¹⁷

4. Independent Evaluation of Vermont Yankee Plant

CAN Issue 4: "Given the historical problems in NRC Region I, CAN contends that an independent evaluation of the Vermont Yankee nuclear generating station is required before any license transfer application can proceed." See CAN's Petition at 37.

¹⁶ See *Oyster Creek*, CLI-00-6, 51 NRC at 203, 209-10. See also *id.* at 214 ("the Commission is interested in whether the plant poses a risk to the public health and safety, and so long as personnel decisions do not impose that risk, our regulations and policy do not preclude a licensee from reducing or replacing portions of its staff").

¹⁷ For reasons similar to those given in the text, CAN's Issues 2B, 2B1, and 2B2 are also inadmissible:

CAN's Issue 2B: "Since AmerGen [Vermont] is a newly formed corporation, we must look to its parent companies to assess their qualifications to own and operate [the Vermont Yankee plant] and a fleet of nuclear generating stations. The record of these companies is not good enough to warrant license transfer without an in-depth investigation through a formal hearing process." See CAN's Petition at 21.

CAN Issue 2B1: "AmerGen's policy of cost-cutting through job cutting jeopardizes the health and safety [of] Vermont Yankee workers and the public; absent license transfer conditions requiring a base level of staffing for full time employees and contractors to assure safe reactor operations, the license transfer must be denied." See CAN's Petition at 26.

CAN Issue 2B2: "[British Energy's] commitment to excessive overtime jeopardizes the worker and public health and safety and unless there are commitments by the transferee to establish a base level of overtime for both full time employees and contractors to assure the safe operation of the reactor, the license transfer should be denied." See CAN's Petition at 29.

In general support of these issues, CAN relies on Mr. David Lochbaum's declaration (discussed above). Mr. Lochbaum, in turn, refers to a Union of Concerned Scientists report on overtime and staffing problems in the nuclear industry. Mr. Lochbaum's concerns, however, are general — covering the entire nuclear industry. His declaration raises no claims that are peculiar to the Vermont Yankee license transfer or that raise a genuine question of fact warranting a hearing.

An inquiry such as the one CAN advocates would go considerably beyond the scope of our inquiry in this proceeding, i.e., AmerGen Vermont's qualifications to own and operate the Vermont Yankee plant. We also note that Region I's overall performance in overseeing Vermont Yankee is far outside the scope of a license transfer proceeding. CAN does not explain how any action taken with respect to this license transfer, whether it be denial of the license or the imposition of conditions on the transferee, could remedy CAN's broad complaints that NRC's Region I has abdicated its oversight responsibilities.

5. *Sufficiency of Baseline Funding*

CAN Issue 5: "Given AmerGen's lack of expertise in a deregulated market, CAN contends that the license transfer should be denied until AmerGen and its parent corporations establish baseline funding that is clearly defined and substantially increased over current levels to address the dangers to public health and safety inherent in permitting the controversial and risky endeavor in which AmerGen and its parent companies are engaged." See CAN's Application at 40.

CAN complains of inadequate "baseline funding" but nowhere defines the term; nor is it a term with which we are familiar. We assume, though, that CAN intends to argue that AmerGen Vermont, and AmerGen itself, are underfunded, thus jeopardizing the public health and safety. CAN fails to offer adequate support for that claim.

CAN argues that the Vermont Yankee plant is in an advanced state of deterioration, and faces such problems as a lack of fuel storage capacity that will cause the operating expenses to increase over current levels. See CAN's Petition at 40. CAN therefore contends that the Commission must hold a hearing to determine the actual costs of operating the facility, including proper maintenance and fuel storage. However, CAN fails to support its position with expert opinion, documentation, or specific facts.¹⁸ Although CAN mentions problems at the facility, such as structural cracks on the ground floor of a building where spent fuel is housed on the seventh floor (see CAN's Petition at 40), CAN has not given us any reason to believe that AmerGen's cost-and-revenue projections fail to take into account such maintenance issues.

CAN next argues that the Commission's current regulatory process for reviewing and approving power plant license transfers never contemplated — and is ill-suited to address — an applicant seeking to acquire 100 plants in North America. According to CAN, the existing Commission review process permits AmerGen to segment the regulatory review of its purchases on a plant-by-plant basis, and thereby precludes the Commission from considering the accumulated

¹⁸ See *Oyster Creek*, quoted *supra* at p. 164.

risks of AmerGen's attempt to buy and operate so large a fleet of reactors. Such a piecemeal approach, CAN continues, violates the letter and spirit of both the AEA and NEPA.

For this reason, CAN asks that the Commission "broaden the scope of [this] proceeding" to include "the ramification[s] of AmerGen's desired centralization of nuclear power generating capacity, along with the parallel issues of impacts upon the human and natural environment, and the health and safety effects of such a potential concentration of responsibility." See CAN's Petition at 41-42. More specifically, CAN is concerned that AmerGen will have insufficient finances and expertise to deal with unscheduled outages, costly repairs, and untimely shutdowns occurring simultaneously at many plants.¹⁹

CAN acknowledges that the "license transfer applications may meet present NRC requirements," but asserts that the Commission should nevertheless broaden the scope of the proceeding to consider the cumulative effects of past and present transfers involving the same applicant. See CAN's Reply Brief at 42. Such an inquiry would go well beyond the scope of the proceeding which is limited to the appropriateness of the proposed Vermont Yankee license transfer.

Nothing in CAN's petition supports conducting an adjudicatory hearing on the matter in the context of the proposed Vermont Yankee transfer. While CAN raises a purely theoretical concern about PECO and British Energy owning an unprecedented number of facilities, predictions about future acquisitions are purely speculative and the fact remains that the potential acquisition of Vermont Yankee will not cause them to approach a level of plant ownership that is unprecedented. For example, it is a matter of public record that Commonwealth Edison has owned more than a dozen plants for a lengthy period of time. See note 20, *infra*. This is not to say that the Commission is unconcerned about the effects of consolidating "fleets" of reactors under one owner. In fact, the NRC Staff is currently conducting a study on the policy implications of industry consolidation. See COMNJD-99-06 (Feb. 10, 2000) (released to the public on Feb. 11, 2000).

Next under the rubric of "Issue 5," CAN challenges the acceptability of AmerGen's creating limited liability holding companies ("LLCs"). (Although CAN is again not specific, we assume it is alluding to AmerGen Vermont.) CAN argues that, although other players in the nuclear industry have regularly set up LLCs, AmerGen's situation differs from those of other players in two critical respects: the others have proven track records of expertise and financial assurance necessary for the safe operation and decommissioning of nuclear power plants, and their financial competence was guaranteed by state regulation and ratepayer subsidies. By contrast, according to CAN, AmerGen has so limited a

¹⁹ See CAN's Petition at 42. See also Vermont's Petition at 5. Cf. CAN's Reply at 11 ("multiple reactor acquisitions will have an effect upon AmerGen's financial adequacy to operate, decommission, and clean up" the Vermont Yankee plant).

track record as to be meaningless, and it will operate in a deregulated environment offering no ratepayer guarantees. CAN asserts that AmerGen simply lacks the necessary expertise and financial qualifications to guarantee its ability to safely operate and decommission a fleet of nuclear stations in a deregulated energy market — especially where AmerGen’s plants are aging and embrittled, their decommissioning costs are uncertain, and waste disposal possibilities are likewise uncertain. *See* CAN’s Petition at 42-43.

The Commission has recently ruled that the limited liability nature of LLCs does not preclude them from owning and operating nuclear power plants. *See Oyster Creek*, 51 NRC at 208 (ruling that limited liability companies are no different from corporations in that both are legally structured to limit the liability of their shareholders, and that the Commission has issued reactor licenses to such limited liability organizations for decades); *accord Monticello*, CLI-00-14, 52 NRC at 57. CAN’s first distinction (that prior transferees had proven track records) is inaccurate. AmerGen Vermont was the new creation of an existing entity just as New NSP (also a limited liability company) was when it took over the plant and personnel at Monticello and Prairie Island from Northern States Power Company. *See Monticello*. Similarly, AmerGen owned no plants before it purchased TMI-1 and Clinton. CAN’s second distinction (that earlier transferees’ financial competence was guaranteed by state regulation and ratepayer subsidies) would essentially preclude most sales of nuclear power plants in the current financial environment of deregulation, given that (as of December 1999) 60 of the 103 nuclear power plants operate in states that have, to some degree, restructured their electric industries. As the Commission has previously stated:

[W]e cannot accede to NEP’s [petitioner’s] seeming view that Little Bay [the proposed transferee] inherently cannot meet our financial qualification rules because its rates are not regulated by a state utilities commission. This view runs counter to the premise underlying the entire restructuring and economic deregulation of the electric utility industry, i.e., that the marketplace will replace cost-of-service ratemaking. In our view, unregulated electricity rates are not incompatible with maintaining sufficient financial resources to operate a nuclear power reactor.

Seabrook, CLI-99-6, 49 NRC at 222.

Finally, CAN considers “the mere administrative formality of a [S]ubpart M license transfer process . . . ill equipped” to evaluate adequately the effects of industry consolidation and limited liability companies, and therefore recommends that the Commission suspend all license transfer proceedings involving AmerGen “until . . . NRC has established the necessary criteria to make such evaluations.” *See* CAN’s Petition at 43-44. We see no immediate threats to public health and

safety requiring such a drastic course of action.²⁰ We reiterate that CAN has provided us no sufficient basis to hold a hearing on the Vermont Yankee transfer.

6. *Antitrust Implications*

CAN Issue 6: “NRC has not adequately examined the implications of AmerGen’s commitment to establish a fleet of nuclear power stations in America and Canada in light of the serious anti-trust implications of such a fleet in the hands of what is, essentially, a single company. These implications include, but are not limited to: (a) regional energy dependence on a single supplier, a matter potentially adverse to the national interest and national security, (b) health and safety issues for workers and persons living in proximity to Vermont Yankee or any of the facilities in the event that the single corporate holder is unable to maintain the necessary capital flow for operations, maintenance, repairs, and/or decommissioning, and (c) foreign domination of a corporation in control of a large portion of the U.S. nuclear electric generating capacity.” See CAN’s Petition at 45.

The Commission no longer conducts antitrust reviews of license transfer applications. See Final Rule, “Antitrust Review Authority: Clarification,” 65 Fed. Reg. 44,649 (July 19, 2000); *Kansas Gas and Electric Co.* (Wolf Creek Generating Station, Unit 1), CLI-99-19, 49 NRC 441 (1999). See also p. 168, *supra*. CAN disagrees with our ruling in *Wolf Creek* but has not convinced us that either our detailed analysis or our conclusions in that decision are mistaken. We note, too, that our decision in *Wolf Creek* and our subsequent rulemaking preclude neither the Federal Trade Commission nor the Department of Justice from conducting an antitrust review of the transfer.

7. *Sufficiency of Parent Companies’ Various Financial Guarantees*

CAN Issue 7: “AmerGen’s parent companies have . . . committed to put up only \$110 million to assure their joint venture has sufficient revenues to safely operate its fleet of reactors. The funds reasonably required to support an endeavor on the scale AmerGen intends far exceeds that amount. Given that: (a) many of AmerGen’s reactors will be in varying state[s] of operation and decommissioning, (b) Price[-]Anderson Act insurance does not cover decommissioning, and (c) decommissioning costs are always uncertain at best, it is plain that AmerGen’s generalized assurances are insufficient [to] permit license transfer.” See CAN’s Petition at 52.

²⁰Notably, as mentioned above, a fleet of three (and soon, four) operating plants (i.e., units) owned by AmerGen and its family of companies is not out-of-the-ordinary when compared with the holdings of other nuclear utilities — either currently or historically. For instance, Commonwealth Edison has, for quite some time, held an ownership interest in 12.5 plants. Similarly, Entergy currently owns 5.9 plants (3.9 being long-term holdings), Duke 5.3 (all long-term holdings), and PECO 4.7 plants (again, all long-term holdings).

This issue seems straightforward enough: CAN believes that \$110 million is an insufficient cushion of operating and decommissioning funds.²¹ We see no reason for a hearing on this issue. The parent company guarantee is supplemental information and not material to the financial qualifications determination under 10 C.F.R. § 50.33(f)(2).²² CAN has given us no reason to doubt the Applicant's assertion that AmerGen Vermont has satisfied our financial qualification requirements for funding the operation and maintenance of the plant. *See* Application at 20-24; SER at 3-9. For the reasons previously set forth in this Order, CAN has also not demonstrated that a genuine issue for hearing exists concerning a possible shortfall in AmerGen Vermont's decommissioning funding assurance under 10 C.F.R. § 50.75 warranting further inquiry.

Finally, nothing about Price-Anderson coverage changes as a result of this license transfer. The same coverage will exist after license transfer as exists today. Moreover, contrary to what CAN suggests, Price-Anderson indemnification agreements continue in effect even after plants have ceased permanent operation and are engaged in decommissioning. *See* 10 C.F.R. § 140.92 (NRC Indemnification Agreement, art. VII); 10 C.F.R. § 50.54(w). Thus, CAN's Price-Anderson argument is ill-conceived; it does not affect our previous finding that CAN has failed to raise a genuine issue for hearing concerning the adequacy of decommissioning funding.

Vermont Issue 1: "The funding arrangements described by the Joint Applicants are not adequate because the \$110 million pledge by AmerGen's members is not sufficient to pay the full costs of a 6-month outage at Vermont Yankee considering scenarios which might reasonably occur." *See* Vermont's Petition at 3-5.

In support of this issue, Vermont offers an affidavit from State Nuclear Engineer William K. Sherman of the Vermont Department of Public Service. Mr. Sherman's argument can be distilled to the following:

- (1) Section 50.33(f)(2) of the Commission's regulations requires both 5-year cost projections and a showing of sufficient revenue to meet those expenses.
- (2) Given the volatility of electricity prices, AmerGen Vermont has provided no assurance that the operating revenue from Vermont Yankee would provide an adequate source to meet that plant's ongoing operational expenses during an unanticipated 6-month outage.

²¹ Although the original amount of this Funding Agreement guarantee was \$110 million, PECO and British Energy later increased the amount to \$200 million. *See* Letter to Samuel J. Collins, Director of NRC's Office of Nuclear Reactor Regulation, from Gerald R. Rainey, CEO of AmerGen, dated April 6, 2000 (and attachments).

²² *See Oyster Creek*, CLI-00-6, 51 NRC at 205. We have previously noted that we recognize that the NRC Staff does include conditions requiring a parent company guarantee in the orders approving license transfers, as additional assurance of financial qualifications, in cases like this one in which such a guarantee has been offered by the Applicant. *See id.* at 205 n.8.

- (3) Given that AmerGen Vermont may be required to pay some or all of its revenue to its parent corporations, AmerGen Vermont has provided no assurance that its net income will even be available to fund future operational shortfalls.
- (4) Simultaneous 6-month outages at multiple AmerGen reactors are a reasonable possibility and not without precedent.
- (5) Immediate decommissioning is not an alternative for insufficient funding.
- (6) Consequently, AmerGen must be able to rely on the \$110 million guarantee in addition to its net revenue and available assets.
- (7) However, \$110 million is insufficient to cover the costs of a 6-month outage at Vermont Yankee if the guaranteed funds were also apportioned to another of the various facilities owned by AmerGen.²³
- (8) There is no guarantee that AmerGen Vermont's parents will be liable for more than the \$110 million.

See Sherman Affidavit at 3-7, attached to Vermont's Petition.

Vermont's financial concerns are supported by the affidavit of an expert and plainly fall within the scope of this proceeding — i.e., Vermont raises questions about AmerGen Vermont's compliance with the Commission rule on financial qualifications to operate a nuclear power reactor. See 10 C.F.R. § 50.33(f)(2). As we ruled in *Oyster Creek*, a license transfer applicant satisfies our financial qualifications rule if it provides a cost-and-revenue projection for the first 5 years of operation that predicts sufficient revenue to cover operating costs. See 51 NRC at 206-08. However, we have also held that where a petitioner raises a genuine issue about the accuracy or plausibility of an applicant's cost-and-revenue projection, the petitioner is entitled to a hearing. See *Seabrook*, 49 NRC at 220-21.

Here, inconsistencies and unexplained assertions in Mr. Sherman's affidavit defeat Vermont's claim that it has raised a genuine dispute of fact or law requiring a hearing on financial qualifications. For example, in support of the claim that AmerGen Vermont's projected revenue would be insufficient to cover Vermont Yankee's expenses during a 6-month outage, Mr. Sherman provides market price projections for Vermont Yankee's electricity that indicate annual price changes ranging from +1.9% to -8.5% and averaging about -3.75%.²⁴ However, these numbers reflect a reduction in market prices significantly milder than the 10% decline he assumes when concluding that AmerGen Vermont's own projected net revenue will drop to the point where it earns almost no net profit. Compare

²³ AmerGen currently owns the reactors at Three Mile Island 1, Clinton, and Oyster Creek.

²⁴ See Exh. WKS-4. Mr. Sherman does not explain either his numbers' meaning or derivation, and claims to present these projections simply for the purpose of illustrating the volatility of market price forecasts — a conclusion we do not doubt. See Sherman Affidavit at 3. We see no reason to hold a license transfer hearing to allow Vermont to demonstrate the obvious proposition that electricity price forecasts are uncertain. A hearing would have been called for only if Vermont, through Mr. Sherman or otherwise, reasonably had alleged that AmerGen Vermont's cost and revenue projections are implausible.

Sherman Affidavit at 4 and Exh. WKS-3 with Exh. WKS-4. Moreover, his only justification for this 10% figure is that it is “not an unreasonable possibility,” “considering the speculative nature of estimated market prices.” See Sherman Affidavit at 4. He further admits both that *Vermont’s own* estimated market prices for electricity are higher than those projected by AmerGen Vermont (and therefore higher than his own projections) and that electricity prices are currently on the rise. See Sherman Affidavit at 4. Finally, even using Mr. Sherman’s own estimates based on a 10% fall in market price, Vermont Yankee’s estimated revenue would still be sufficient to cover its costs for the first 5 years. See Exh. WKS-3. Mr. Sherman’s key assertions, in short, fail to show that a genuine dispute exists with the Applicants.

Similarly, we find no support in Vermont’s filings for Mr. Sherman’s assumption that the costs of outages at other plants would cause AmerGen to consume its \$110 (now \$200) million supplemental fund, leaving the Vermont Yankee facility underfunded. Vermont made no effort to show that the operating revenue at those other plants could not cover some or all of the costs of such an outage. Moreover, the Sherman affidavit addresses the original \$110 million supplemental fund only. Vermont has made no effort to supplement its pleadings to claim inadequacy of what is now a \$200 million commitment. Nor does Vermont offer any reason to question AmerGen’s more general commitment to provide “such funds [as] are necessary” to meet ongoing expenses or to maintain safety. See note 26, *infra*, and accompanying text. As we have held, in any event, absent a demonstrated shortfall in the revenue predictions required by 10 C.F.R. § 50.33(f), the adequacy of a corporate parent’s supplemental commitment is not material to our license transfer decision. See *Oyster Creek*, CLI-00-6, 51 NRC at 205.

Vermont Issue 3: “The funding arrangements described by the Joint Applicants are not adequate because the \$110 million pledged by AmerGen’s members is not sufficient to pay the full potential costs for which Vermont Yankee would be liable in the event of a severe nuclear accident resulting in Price-Anderson liability.” See Vermont’s Petition at 6-8.

Vermont alleges that AmerGen Vermont’s potential liability in case of a severe nuclear accident would be \$88 million.²⁵ Therefore, Vermont argues, the \$110 million (now \$200 million) guarantee, which is intended to cover *all* facilities of AmerGen and AmerGen Vermont, would be insufficient to cover the potential liability should severe accidents occur at all facilities potentially covered by this guarantee (Vermont Yankee and the three other facilities currently owned by AmerGen).

²⁵ This amount is calculated by adding a 5% surcharge to the \$83.9 million number specified in our regulations. See 10 C.F.R. § 140.11(a)(4); Final Rule, “Adjustment of the Maximum Retrospective Deferred Premium,” 63 Fed. Reg. 39,015 (July 21, 1998).

AmerGen Vermont counters that our regulations only require it to show that it has sufficient cash equivalents (such as the parent company guarantee) to cover the retroactive \$10 million premium required by our regulations at 10 C.F.R. § 140.21(e)-(f). *See Oyster Creek*, CLI-00-6, 51 NRC at 206. We agree. Vermont's argument that the applicant must meet financial requirements in addition to those imposed by our regulations constitutes an impermissible attack on our regulations. Moreover, as explained earlier in this section, prior to issuance of the amended license, AmerGen Vermont must obtain all regulatorily required property damage insurance.

Finally, we reiterate that, although AmerGen's \$200 million reserve fund provides significant assurance of sufficient operating and decommissioning funds in the event of a problem, the fund is not required by our rules. It therefore lies outside the bounds of our license transfer hearing process — which focuses on whether AmerGen Vermont meets the required financial and technical qualifications.

Vermont Issue 2: “The funding arrangements described by the Joint Applicants are not sufficient because AmerGen's Performance Guarantee for AmerGen Vermont creates a funding gap between the end of operation and the beginning of decommissioning such that sufficient funds would not be available to maintain the plant safely.” *See Vermont's Petition* at 5-6.

Vermont here is concerned, not about the \$200 million supplemental funding guarantee addressed above, but rather about AmerGen's guarantee to AmerGen Vermont that “AmerGen Vermont will . . . have the right to continue to obtain the funds necessary to assure the safe and orderly shutdown of [the Vermont Yankee plant] and continue the safe maintenance of [the plant] until AmerGen Vermont can certify to the NRC that the fuel has been permanently removed from the reactor vessel.” *See Letter from Charles P. Lewis, Vice President, AmerGen Energy Co., to AmerGen Vermont, dated Jan. 6, 2000, at 2, appended as Attachment 8 to Application.*

Vermont's concerns are misplaced. In a later letter supplementing the January 6th guarantee, AmerGen explained that the language quoted above was “in no way intended to limit AmerGen Vermont's right to continue to obtain funds under this agreement until such time as decommissioning is completed.” AmerGen then went on to state that:

it will provide funding to AmerGen Vermont, *at any time* that the Management Committee of AmerGen Vermont determines that, in order to protect the public health and safety and/or to comply with NRC requirements, such funds are necessary to meet the ongoing expenses at [the plant] or such funds are necessary to safely maintain [the plant].

This agreement shall . . . remain in effect and remain irrevocable *until* such time as *decommissioning is completed*.²⁶

Consequently, Vermont's "funding gap" claim fails to raise a genuine dispute requiring a hearing under NRC rules. We therefore decline to admit this issue.

II. CONCLUSION

For the reasons set forth above, the Commission:

- (1) *denies* CAN's petition to intervene and request for hearing;
 - (2) *denies* Vermont's petition to intervene and request for hearing;
 - (3) *dismisses* as moot CAN's various requests for a stay of the instant proceeding;
 - (4) *denies* CAN's motion that any hearing be conducted under 10 C.F.R. Part 2, Subpart G; and
 - (5) *terminates* this adjudicatory proceeding.
- IT IS SO ORDERED.

For the Commission

ANNETTE L. VIETTI-COOK
Secretary of the Commission

Dated at Rockville, Maryland,
this 6th day of October 2000.

²⁶ See Letter from Charles P. Lewis, Vice President, AmerGen Energy Co., to AmerGen Vermont, dated Feb. 17, 2000, at 2 (emphasis added), appended to Answer to Vermont's Petition, dated March 6, 2000. Vermont filed no reply to AmerGen Vermont's Answer.

UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

ATOMIC SAFETY AND LICENSING BOARD

Before Administrative Judges:

Charles Bechhoefer, Chairman
Dr. Richard F. Cole
Dr. Charles N. Kelber

In the Matter of

Docket No. 50-423-LA-3
(ASLBP No. 00-771-01-LA)
(Facility Operating
License NPF-49)

NORTHEAST NUCLEAR ENERGY
COMPANY

(Millstone Nuclear Power Station, Unit 3)

October 26, 2000

In a proceeding subject to the hybrid hearing procedures of 10 C.F.R. Part 2, Subpart K, involving the proposed increase in capacity of the spent fuel pool of the Millstone Nuclear Power Station, Unit 3, the Licensing Board issues a Memorandum and Order that adopts a license condition, agreed to by all parties, arising from one of the admitted contentions; denies a full evidentiary hearing on the other two admitted contentions; and terminates the proceeding.

RULES OF PRACTICE: 10 C.F.R. PART 2, SUBPART K HYBRID
HEARING PROCEDURES

In a proceeding involving the proposed expansion in capacity of a reactor's spent fuel pool, use of the hybrid hearing procedures of 10 C.F.R. Part 2, Subpart K, is mandatory when requested by any party. 10 C.F.R. § 2.1109(a).

RULES OF PRACTICE: EX PARTE COMMUNICATIONS

When a licensing board tours a facility that is of concern in an adjudicatory proceeding, there is no regulatory requirement for the tour to be transcribed. To avoid any *ex parte* contacts between the Licensing Board and the Licensee, each of the parties is invited to attend the tour. See *Dairyland Power Cooperative* (La Crosse Boiling Water Reactor), LBP-80-2, 11 NRC 44, 50 (1980).

RULES OF PRACTICE: HEARING REQUIREMENT

There is a two-part test established in 10 C.F.R. § 2.1115(b) for determining whether, in a proceeding subject to the procedures of 10 C.F.R. Part 2, Subpart K, a full evidentiary hearing is warranted on a given contention: (1) there must be a genuine and substantial dispute of fact that can only be resolved with sufficient accuracy by the introduction of evidence in an adjudicatory hearing; and (2) the decision of the Commission is likely to depend in whole or in part on the resolution of that dispute.

NUCLEAR WASTE POLICY ACT: WASTE DISPOSAL

Persons owning and operating civilian nuclear power reactors have the primary responsibility for providing interim storage of spent nuclear fuel from such reactors by maximizing, to the extent practical, the effective use of existing storage facilities at the site of each civilian nuclear power reactor, and by adding new onsite storage capacity in a timely manner where practical. 42 U.S.C. §§ 10101, 10151 (1982).

LICENSING BOARD: SCOPE OF REVIEW (CONTENTIONS)

Except with respect to identifying the precise administrative controls proposed to be utilized, as well as the existing administrative controls that would be superseded, the litigable issue posed by intervenor that General Design Criterion 62 (GDC 62) precludes ongoing administrative controls essentially boils down to a question of law. See *Northeast Nuclear Energy Co.* (Millstone Nuclear Power Station, Unit 3), LBP-00-2, 51 NRC 25, 41 (2000).

RULES OF PRACTICE: EXPERT WITNESS

In a proceeding subject to 10 C.F.R. Part 2, Subpart K, the testimony of an expert witness with experience and training having some bearing upon the subject matter of the proceeding will not be stricken, even though not directly focused on the precise technical question to be resolved. Although lack of precise training

may adversely affect the weight to be accorded such testimony *vis-à-vis* that of other witnesses, the testimony is nonetheless admissible.

REGULATIONS: INTERPRETATION (GDC 62)

The plain language of GDC 62 does not, by its terms, differentiate between the types of administrative controls that intervenor finds permissible or objectionable; nor does it bar the use of any type of administrative controls, either the one-time controls that intervenor would permit or the ongoing administrative controls that intervenor finds objectionable.

REGULATIONS: INTERPRETATION (GDC 62)

The “preference” in GDC 62 for “geometrically safe configurations” is only a preference and does not appear to be a bar to using other additional means for preventing criticality in spent fuel pools. GDC 62 does not bar the use of certain types of administrative controls in complying with applicable regulatory standards regarding criticality controls. *See Carolina Power & Light Co.* (Shearon Harris Nuclear Power Plant), LBP-00-12, 51 NRC 247, 255-59 (2000).

RULES OF PRACTICE: COMMISSION GUIDANCE

Conformance with Regulatory Guides likely means that a licensee has conformed with the applicable GDC. *See Petition for Emergency and Remedial Action*, CLI-78-6, 7 NRC 400, 407 (1978).

TECHNICAL ISSUES DISCUSSED

The following technical issues are discussed: spent fuel pool criticality calculations, administrative controls on spent fuel pool storage, and criticality accidents.

APPEARANCES

David A. Repka, Esq., Donald P. Ferraro, Esq., Washington, D.C., and **Lillian M. Cuoco, Esq.,** Berlin, Connecticut, for Northeast Nuclear Energy Company (NNECO), Licensee

Nancy Burton, Esq., Redding Ridge, Connecticut, for the Connecticut Coalition Against Millstone and the Long Island Coalition Against Millstone (CCAM/CAM), Intervenor

Ann P. Hodgdon, Esq., Robert M. Weisman, Esq., Susan L. Uttal, Esq., and Brooke D. Poole, Esq., for the Nuclear Regulatory Commission Staff

MEMORANDUM AND ORDER
(Adopting Agreed License Condition,
Denying Request for Evidentiary Hearing on Other Issues, and
Terminating Proceeding)

This proceeding pertains to the proposed increase in capacity of the spent fuel pool (SFP) of the Millstone Nuclear Power Station, Unit 3 (Millstone-3), through the use of additional high-density storage racks. At the request of Northeast Nuclear Energy Co. (NNECO or Licensee), the proceeding is subject to the hybrid hearing procedures of 10 C.F.R. Part 2, Subpart K (10 C.F.R. §§ 2.1101-2.1117). Under those procedures, the Atomic Safety and Licensing Board on July 19-20, 2000, conducted an oral argument pursuant to 10 C.F.R. § 2.1113 (Tr. 308-540), concerning the question of whether a full evidentiary hearing on any of the issues in controversy is warranted.

Of the three contentions that we admitted (designated as Contentions 4, 5, and 6), one (number 5) was essentially settled by the parties, leading to a license condition that we indicated at the oral argument we would approve (Tr. 337). We do so here. Of the others, for reasons set forth below, we have determined that a further evidentiary hearing is not warranted.

A. Background

On March 19, 1999, NNECO submitted a license amendment application to NRC seeking to increase the capacity of the Millstone-3 SFP from 756 fuel assemblies to 1860 assemblies. A Notice of Opportunity for a Hearing was published in the *Federal Register* of September 7, 1999.¹ In response, a timely joint petition for leave to intervene was filed on October 6, 1999, by the Connecticut Coalition Against Millstone (CCAM) and the Long Island Coalition Against Millstone (CAM) (hereinafter collectively referred to as “CCAM/CAM” or “Intervenor”). This Atomic Safety and Licensing Board was constituted on

¹ 64 Fed. Reg. 48,672-75 (1999).

October 19, 1999, to preside over this proceeding.² Both NNECO and the NRC Staff (Staff) opposed the petition for lack of standing of either Petitioner.³

By our Memorandum and Order (Intervention Petition), dated October 28, 1999 (unpublished), we noted that, as filed, the CCAM/CAM petition failed to set forth adequately the Petitioners' standing. But we also pointed out that the NRC Rules of Practice afford a petitioner the right to amend its petition, without prior approval of the Licensing Board, at any time prior to 15 days before the first prehearing conference. 10 C.F.R. § 2.714(a)(3). We permitted such an amendment to be filed at the same time as proposed contentions were to be filed, and we scheduled a prehearing conference that was held on December 13, 1999, in New London, Connecticut.⁴

CCAM/CAM filed a Supplemental Petition on November 17, 1999, that included the amendments to their statements of standing, together with eleven proposed contentions. Both NNECO and the Staff concluded that CCAM had demonstrated standing, that CAM had not successfully done so, and that none of the eleven proposed contentions was admissible.⁵ On February 9, 2000, the Licensing Board issued its Prehearing Conference Order (Granting Request for Hearing), LBP-00-2, 51 NRC 25, finding both CCAM and CAM to have established their standing and three of their joint contentions (numbers 4, 5, and 6) to be admissible.⁶ Each of the admitted contentions dealt with an aspect of SFP criticality.

On February 22, 2000, NNECO, in accordance with 10 C.F.R. § 2.1109(a), invoked the hearing procedures of 10 C.F.R. Part 2, Subpart K, which are mandatory for use in a proceeding of this type when requested by any party. Those hearing procedures establish limits on discovery plus provide for written summaries and affidavits leading to an oral argument with respect to whether an evidentiary hearing is warranted on any contention. 10 C.F.R. §§ 2.1111, 2.1113, 2.1115. On April 18, 2000, the Licensing Board conducted a telephone conference call with the parties to establish schedules for the proceeding in accordance with the Subpart K requirements. (A 90-day discovery period, as authorized under Subpart K, had already commenced, pursuant to an approximately 90-day pre-Subpart-K-designation discovery period prescribed in LBP-00-2, 51 NRC at 47.) The schedules were memorialized by our Memorandum and Order (Schedules for Proceeding), dated April 19, 2000, unpublished, which acknowledged that

² See 64 Fed. Reg. 57,485-86 (Oct. 25, 1999).

³ [NNECO's] Answer to Request for a Hearing and Petition to Intervene, dated Oct. 21, 1999; NRC Staff's Response to the Petition to Intervene filed by [CCAM] and [CAM], dated Oct. 26, 1999.

⁴ A Notice of Prehearing Conference was issued on November 2, 1999. See 64 Fed. Reg. 60,854 (Nov. 8, 1999).

⁵ [NNECO's] Answer to Supplemental Petition to Intervene, dated November 30, 1999; NRC Staff's Response to Supplemental Petition to Intervene Filed by [CCAM/CAM], dated December 7, 1999.

⁶ Simultaneously, on February 9, 2000, the Licensing Board issued a Notice of Hearing. See 65 Fed. Reg. 7573 (Feb. 15, 2000). Neither NNECO nor the Staff filed an appeal of LBP-00-2 pursuant to 10 C.F.R. § 2.714a.

discovery was to be completed by May 30, 2000, that written summaries were to be filed by June 30, 2000, and that oral argument would be conducted in the New London, Connecticut area on July 19-20, 2000.⁷

On April 18, 2000, the same day as the above-referenced conference call, NNECO advised the Licensing Board and parties that it was modifying its proposed license amendment to incorporate a technical specification dealing with the boron question that was the subject of Contention 5. The parties later reached agreement that the technical specification would be incorporated into the proposal at issue, leading to acknowledgment by the parties that the substantive concerns advanced by CCAM/CAM in Contention 5 had been satisfied. (This is the technical specification that the Licensing Board adopted, as referenced earlier in this opinion.)

During discovery, NNECO and the Staff filed several motions for protective orders to limit the matters on which they would have to respond. On May 9, 2000, NNECO filed a motion to bar the proposed deposition of Robert Griffin, a chemistry manager at Millstone, on the primary ground that NNECO did not intend to present Mr. Griffin as one of its witnesses. Taking into account the CCAM/CAM response filed on May 10, 2000, the Licensing Board, by Memorandum and Order dated May 10, 2000 (unpublished), denied the motion for a protective order. We found that NNECO had not shown “good cause” for barring the deposition in that Mr. Griffin might be able to provide information relevant to Contention 5, if not also Contention 4.

On May 22, 2000, NNECO filed another Motion for Protective Order, on the ground that certain discovery requests of CCAM/CAM were untimely, in that, taking into account normally prescribed periods for responding to interrogatories and motions for production of documents (including mailing time for first-class mail), the discovery would extend beyond May 30, 2000, the date previously set for the close of discovery. On May 25, 2000, the NRC Staff filed its own Motion for Protective Order, based on similar reasoning. In a filing dated May 24, 2000, CCAM/CAM opposed these motions, on the ground that the discovery in question had arisen out of evasive or incomplete information provided in response to previous of their discovery requests, including a deposition of Michael C. Jensen (a proposed NNECO witness) that CCAM/CAM took on May 11, 2000. On May 26, 2000, the Licensing Board conducted a telephone conference call to resolve these and other discovery questions.

As later memorialized in a Memorandum and Order (Discovery Rulings, 5/26/00 Telephone Conference), dated June 8, 2000 (unpublished), the Licensing

⁷The prescribed discovery period was subsequently extended for the limited purpose of allowing NNECO time to respond to certain interrogatories and requests for production of documents filed by CCAM/CAM on May 19, 2000. The June 30, 2000 date for filing CCAM/CAM's written summaries was subsequently briefly extended to accommodate certain technical problems (such as a computer lockup) encountered by the Intervenor.

Board permitted certain discovery sought by all parties, notwithstanding the extension of the discovery period in certain cases beyond the May 30 termination of discovery, but it granted protective orders for certain other requested discovery. The Board's discovery rulings noted that, even though certain response times were extended beyond May 30, the June 30 date for filing written summaries was not being extended.⁸ The Board's intent was to assure that as complete a record as possible was achieved on important questions bearing upon the resolution of each of the contentions (but, in particular, Contention 4).

On June 8, 2000, the NRC Staff filed a motion to dismiss CCAM/CAM Contention 4, on the ground that the Intervenor had not been responsive in answering certain Staff discovery requests concerning that contention. (The Intervenor had responded to the Staff discovery inquiries, but their response was not what the Staff had expected.) The Licensing Board, after advising the Licensee and Intervenor that they need not respond to the Staff motion, dismissed that motion in a June 13, 2000 Memorandum and Order (Denying Staff's Motion to Dismiss CCAM/CAM Contention 4) (unpublished).

On June 30, 2000, NNECO and the Staff filed their written summaries and affidavits, as provided by our earlier scheduling orders.⁹ In those summaries, they also responded to technical questions posed by the Licensing Board to the parties on May 23, 2000. NNECO's written summary was founded upon the affidavits of Mr. Joseph J. Parillo, a Senior Engineer in the Nuclear Analysis Section at Millstone; Dr. Stanley E. Turner, the Senior Vice President and Chief Nuclear Scientist at Holtec International; Mr. Michael C. Jensen, the Supervisor of Operator Training for Millstone Unit 2; Mr. Robert G. McDonald, the primary systems chemist for Millstone Units 2 and 3; and Mr. David W. Dodson, the Supervisor—Millstone Unit 3 Licensing. The Staff's written summary was founded upon the affidavits of Dr. Anthony C. Attard, a reactor Physicist/Engineer in the NRC Reactor Systems Branch; Dr. Laurence I. Kopp, Senior Reactor Engineer in the Reactor Systems Branch, Division of Safety Systems and Analysis, Office of Nuclear Reactor Regulation (NRR); Mr. James C. Linville, Acting Director, Division of Reactor Projects, NRC Region 1 (and, until recently, Acting Director of the Millstone Project Directorate, Region 1); and Mr. Antone C. Cerne, Senior Resident Inspector at Millstone-3.

⁸On May 12, 2000, the Licensing Board issued a Notice of Oral Argument and Opportunity for Oral Limited Appearance Statements. (The Notice was published at 65 Fed. Reg. 31,617 (May 18, 2000).) The Notice provided for oral argument on July 19-20, 2000, and for oral limited appearance statements on July 18, 2000, and July 20, 2000. A site tour for the Licensing Board and all parties was also scheduled for July 20, 2000.

⁹Summary of Facts, Data, and Arguments on which [NNECO] Proposes To Rely at the Subpart K Oral Argument, dated June 30, 2000 [NNECO Written Summary]; NRC Staff Brief and Summary of Relevant Facts, Data and Arguments upon Which the Staff Proposes to Rely at Oral Argument on Contentions 4, 5 and 6, dated June 30, 2000 [NRC Staff Written Summary].

The Intervenors likewise responded to the Board's questions on June 30, 2000,¹⁰ but filed motions to request extensions to file their written summaries because of computer lockup and technical problems in getting a "declaration" from one of their expert witnesses. The Licensee offered no objection to the extension because of computer lockup, as long as the Intervenors would certify that, as a result of the extension, they had not revised their statements to take account of the other parties' filings. (At the oral argument, CCAM/CAM so certified. Tr. 316-317.) CCAM/CAM filed their initial written summary on July 3, 2000, but, by motion dated July 6, 2000, moved to file a Supplementary Declaration (of David A. Lochbaum) and to conform their summary to reflect the Declaration of Mr. Lochbaum. Both the Staff and NNECO opposed this July 6, 2000 motion by filings dated July 6, 2000, and July 7, 2000, respectively. In addition, the NRC Staff on July 7, 2000, filed a motion to strike the CCAM/CAM written summary. The Licensee on July 12, 2000, supported that motion. By Memorandum and Order (Ruling on Various Motions and Procedure at Oral Argument), dated July 14, 2000 (unpublished), the Licensing Board rejected all of the NNECO and Staff motions and, in effect, permitted the extended filing dates for CCAM/CAM. *See* Tr. 314-315.¹¹ The Board acknowledged the importance of simultaneous filings, as contemplated by 10 C.F.R. Part 2, Subpart K, but also emphasized the desirability of having as complete a record as possible. As filed,¹² the CCAM/CAM written summary was founded upon the declarations of Dr. Gordon Thompson, Executive Director of the Institute for Resource and Security Studies; and Mr. David A. Lochbaum, nuclear safety engineer with the Union of Concerned Scientists, with responsibility for directing the UCS's nuclear safety program. (In accepting the CCAM/CAM filing, the Board also found that the Staff position concerning whether the Intervenors' written summaries were sworn testimony, as required by Subpart K, to be legally untenable given the Commission's long-standing practice of treating filings under either oath or affirmation as sworn statements and determining that Intervenors' declarations qualified under that practice.) The Board also prescribed certain procedures to be followed at oral argument.

On July 17, 2000, two days prior to the oral argument, the NRC Staff filed a "Motion To File Affidavit of Antone Cerne Regarding Refueling Outage 6." The motion sought permission for the Staff to supplement its earlier filings with

¹⁰Response of the Intervenors, [CCAM/CAM], to Atomic Safety and Licensing Board Panel's Questions per Memorandum, May 23, 2000.

¹¹Citations in this Memorandum and Order to the Intervenors' written summary will be to the version filed on July 6, 2000. Pages in that written summary were not numbered, but the Licensing Board has hand-numbered the pages, beginning with the initial page and not the transmittal form, and will use those numbers in its citations.

¹²Corrected Detailed Summary of Facts, Data and Arguments and Sworn Submission on Which [CCAM/CAM] Intend to Rely at Oral Argument To Demonstrate the Existence of a Genuine and Substantial Dispute of Fact with the Licensee Regarding the Proposed Expansion of the Spent Fuel Storage Capacity at [Millstone-3], dated July 6, 2000 [hereinafter, CCAM/CAM Written Summary].

an additional affidavit of one of its affiants, Mr. Antone C. Cerne, concerning a topic (refueling outage 6, or RFO6) that was dealt with by the Intervenors' written summary. The Staff claimed that it was surprised by the Intervenors' reliance in their presentation on the events of RFO6, inasmuch as the Intervenors had not included such events in their prior responses to Staff discovery. The motion was opposed by CCAM/CAM¹³ but supported by the Licensee.¹⁴ CCAM/CAM in particular cited the simultaneous filing requirement of Subpart K but also noted that CCAM/CAM had only obtained the underlying documents from NNECO at a late date and that the Staff had neglected to send a representative to the NNECO plant (as it had a right to do under previous Licensing Board discovery rulings) at the time the logs were produced for the Intervenors. Taking into account its previous lenience to the Intervenors with respect to filing dates, as well as the desirability of having as complete a record as possible on the various incidents relied on by the parties in their presentations, the Licensing Board granted the Staff motion and permitted the record to be supplemented with Mr. Cerne's additional affidavit and the underlying documents relative to RFO6 (Tr. 328-329).

At the oral argument, we heard the parties' presentations with respect to each of the contentions, although, as indicated earlier, we truncated the presentations with respect to Contention 5 in view of the parties' agreement on a technical specification that would resolve that contention. Following the oral argument, the Licensing Board and parties' representatives took a site tour of the Millstone Unit 3 SFP.¹⁵

We turn now to a discussion of each of the contentions before us, to determine whether any of them warrants a further evidentiary hearing.

B. Contention 4

CCAM/CAM Contention 4, as admitted in LBP-00-2, 51 NRC at 32-34, reads as follows:

¹³ [CCAM/CAM's] Objection to NRC Staff's Motion To File Affidavit of Antone Cerne Regarding Refueling Outage 6, dated July 18, 2000.

¹⁴ Tr. 317-319 (CCAM/CAM); Tr. 319-321 (NNECO).

¹⁵ At the conclusion of the oral argument on July 20, 2000, CCAM/CAM moved that the forthcoming site tour be transcribed. The Licensing Board denied that motion (Tr. 539). There is no regulatory requirement that a tour of this type be transcribed. When a Licensing Board tours a facility that is of concern in an adjudicatory proceeding, each of the parties is invited to attend, to avoid any *ex parte* contacts between the Licensing Board and the Licensee. See *Dairyland Power Cooperative* (La Crosse Boiling Water Reactor), LBP-80-2, 11 NRC 44, 50 (1980). Here, a representative of CCAM/CAM accompanied the Licensing Board for the duration of the tour, in order to ensure that adequate opportunity was present for the Intervenors to be aware of any communication that occurred between Board members and representatives of the Licensee. Sufficient precautions were thus taken to ensure that *ex parte* contacts did not occur, without the additional logistical problems that would have arisen if the court reporter, with his transcribing equipment, were to have accompanied the parties on the tour.

“Undue and Unnecessary Risk to Worker and Public Health and Safety.”

The new set of administrative controls trades reliance on physical protection for administrative controls to an extent that poses an undue and unnecessary risk of a criticality accident, particularly due to the fact that the licensee has a history of not being able to adhere to administrative controls with respect, *inter alia*, to spent fuel pool configuration.

This contention asserts that NNECO’s proposed reliance on administrative controls to assure proper fuel rod placement (in terms of age of the fuel and burnup considerations) will potentially lead to a criticality accident, in view of the past history of the Licensee of failing to adhere to — indeed, ignoring — various administrative controls concerning the SFP configuration.

As a genesis for this claim, we note that among the reasons leading to the voluntary shutdown of Millstone Unit 3 (following its being placed on the Commission’s “Watch List” because of numerous regulatory violations) from 1996 to 1998 was NNECO’s past failure to adhere to technical specifications concerning, *inter alia*, placement of fuel in the SFP¹⁶ and, indeed, NNECO’s inadequate corrective measures and, in some cases, its attempts to cover up similar failures.¹⁷ CCAM/CAM claim in essence that the failures must be attributable to the inability and/or unwillingness of NNECO to carry out complex administrative controls that, in CCAM/CAM’s view, are proposed to become more complex as the capacity of the SFP to hold fuel rods is increased. Not only does CCAM/CAM deem such controls (indeed *any* ongoing controls) to be legally impermissible (*see* discussion under Contention 6) but, in this contention, they attempt to demonstrate that NNECO is incapable of successfully administering such controls, leading necessarily (in their view) to the likelihood of a potential criticality accident.

At the outset, we must define what a criticality accident is. CCAM/CAM define “criticality accident” as “a criticality accident or a *violation of criticality limits*.”¹⁸ Criticality will not be reached until the k_{eff} of the SFP¹⁹ is at least 1.0. A regulatory goal (not a regulation) is to keep the k_{eff} at 0.95 or lower. Notwithstanding CCAM/CAM’s claim, there is no “accident” when the k_{eff}

¹⁶ See Staff Exh. 12, Plant Information Report No. 3-94-079 (Jan. 14, 1991); Staff Exh. 13, Adverse Condition Report #710 (Apr. 27, 1995). Both errors were identified during the spent fuel process and corrected before any assemblies were physically stored in an incorrect location. *See also* First Cerne Affidavit ¶ 6.

¹⁷ See Notice of Violation and Proposed Imposition of Civil Penalties ([NNECO], Millstone Station Units 1, 2, and 3) (Dec. 10, 1997) (NRC Staff Exh. 11), which identifies alleged violations relating to inadequate engineering, inadequate corrective actions, failure to comply with technical specifications, and failure in implementing aspects of the quality assurance program; *see also United States v. Northeast Nuclear and Northeast Utilities*, No. 3-99-CR-211 (D. Conn. Sept. 29, 1999) (judgment ordering Northeast Utilities and subsidiary NNECO to pay penalties for nuclear safety and environmental law violations relating to false statements made to the NRC regarding the qualifications of reactor operator candidates and the deliberate alteration of wastewater discharge readings).

¹⁸ CCAM/CAM Written Summary at 32 n.41 (emphasis supplied).

¹⁹ The measure of criticality is the estimated ratio of neutron production to neutron absorption and leakage, or k_{eff} . *See* 10 C.F.R. § 50.68(b)(2). *See also* Kopp/Attard Affidavit ¶ 9.

exceeds 0.95 but is less than criticality of 1.0. Further, the widely accepted double contingency principle provides that:

At all locations in the LWR spent fuel storage facility where spent fuel is handled or stored, the nuclear criticality safety analysis should demonstrate that criticality could *not* occur without at least two, unlikely, independent, and concurrent failures or operating limit violations.²⁰

Finally, as a historical fact, no criticality accident resulting from improper use of administrative controls in an SFP has *ever* occurred. Indeed, there has never been, to any party's knowledge, a criticality accident in an SFP.²¹ It is the *potential* for such an accident that underlies the Intervenors' contention. We turn here to this claim.

1. CCAM/CAM Position

In support of their claim that the proposed license amendment would significantly increase the probability of a criticality "accident" — defined by CCAM/CAM (although, as indicated above, improperly so) as a situation where the regulatory goal of k_{eff} of 0.95 is exceeded, CCAM/CAM identify five factors that they claim would increase the probability of a criticality accident:²²

First, the amendment would lead to increased complexity of the administrative controls upon which NNECO will rely to prevent a criticality accident. Second, failure of administrative controls can lead to a criticality accident, and a failure of this type is more likely if administrative controls are more complex. Third, criticality calculations can contain errors, and reliance on administrative controls of increased complexity will increase the potential that such errors will lead to a criticality accident. Fourth, experience shows that administrative controls on fuel positioning are likely to fail, and failure is more likely if these administrative controls are more complex. Fifth, there is a significant probability that the concentration of soluble boron in the pool water will be insufficient to prevent a criticality accident at the time of or subsequent to a fuel mispositioning event.

As an additional factor, CCAM/CAM further stress the existence of ongoing, as well as historical, maintenance problems at the facility.

Additionally, in support of their claim, the Intervenors first assert that the administrative controls under the license amendment would be more complex than previously, on the basis both of (1) the number of parameters considered — from enrichment and burnup at present to enrichment, burnup, and decay time under the proposed amendment — and (2) the increased number of fuel rods

²⁰ See NNECO Written Summary at 23; CCAM/CAM Written Summary, Appendix A. Neither the Intervenors nor the Staff was willing to define what they mean by the term "likely" or "unlikely" (Tr. 365-367, 442).

²¹ Tr. 361; see Los Alamos National Laboratory, United States Dept. of Energy, Report # LA 13638, *A Review of Criticality Accidents* (2000 Rev.) at 64.

²² CCAM/CAM Written Summary at 32.

proposed to be stored. Next, CCAM/CAM refer to a set of mispositioning events at the SFPs of a number of U.S. nuclear power plants.²³ In addition, they cite the January 21, 1987 violation at Oyster Creek Unit 1: Licensee Event Report 219/87-006-00 (Feb. 24, 1987) (CCAM/CAM Exh. 22).²⁴

In support of the proposition that criticality calculations can contain errors, CCAM/CAM cite Licensee Event Reports from two reactors, together with an NRC Information Notice.²⁵

The proposition that boron dilution can occur is not tied to the amendment, but is pertinent because the Licensee relies on soluble boron in the water to conform to regulatory limits in the case of a design-basis accident. NNECO Exh. 1, Tables 4.2.7 and 4.2.8. CCAM/CAM cite a boron dilution event at *McGuire Unit 1, July 11, 1994*,²⁶ as well as a number of other events that demonstrate that errors have occurred at a number of plants while handling fuel.²⁷

Additionally, the Intervenor cite specific entries in the Reactor Engineering logs at Millstone Unit 3 during Refueling Outage 6 (RFO6) as a demonstration of both a continued weakness in maintenance at Millstone Unit 3 and an example of the failure of administrative controls. Finally, the Intervenor cite a Memorandum (CCAM/CAM Exh. 12) from J. F. Beaupre, NNECO Unit 3 Technical Support Engineering, regarding the performance of the equipment during RFO6, in which the equipment performance is said to show an adverse trend in maintenance of fuel handling equipment.

2. NNECO and Staff Positions

NNECO and the Staff take similar positions, concluding that the proposed use of administrative controls is consistent with current industry practices and regulatory norms — in particular, the double contingency principle cited above

²³ *Byron Station: May 28, 1996* (Licensee Event Report 454/96-008-00 (June 25, 1996)) (CCAM/CAM Exh. 19); *Farley Unit 1: March 23, 2000* (Licensee Event Report 348/2000-004-00 (Apr. 20, 2000)) (CCAM/CAM Exh. 20); *McGuire Unit 1: October 24, 1991* (Licensee Event Report 369/91-016-00 (Nov. 25, 1991)) (CCAM/CAM Exh. 21). Fuel handling errors at *Millstone* (CCAM/CAM Exh. 23) are described in the disclosures of NNECO in response to the Intervenor's First Set of Interrogatories dated March 21, 2000 (request for "all instances of error at Millstone in managing, moving, placing, or tracking fresh or spent fuel at Millstone").

²⁴ This event is not, however, a fuel mispositioning event; fresh fuel assemblies were placed where they were supposed to be pending refueling, but the Technical Specification governing the enrichment permitted in the rack had not been amended to account for the increased enrichment of the new fuel.

²⁵ *McGuire Units 1 and 2: March 2, 2000* (Licensee Event Report 369/0003 (Mar. 30, 2000)) (CCAM/CAM Exh. 16); *Millstone Unit 2: February 14, 1992* (Licensee Event Report 336/92-003-01 (June 25, 1992)) (CCAM/CAM Exh. 17); *Millstone Unit 2: April 22, 1992* (NRC Information Notice 92-21, Supplement 1, Spent Fuel Pool Reactivity Calculations) (CCAM/CAM Exh. 18).

²⁶ Licensee Event Report 369/94-005-00 (Aug. 10, 1994) (CCAM/CAM Exh. B-11).

²⁷ See CCAM/CAM Written Summary, Appendix B.

— and is based on a defense-in-depth approach.²⁸ The Staff points to a long history of the use of administrative controls like those proposed by NNECO,²⁹ and that administrative controls of various types are currently used throughout the Millstone-3 plant to assure safe operation. The Staff explicitly points to the quality assurance/quality control provisions of 10 C.F.R. Part 50, App. B.³⁰ The Staff also observes that both the American National Standards Institute (ANSI) Standard ANSI/ANS 8.1 (section 4.2.1, in particular³¹) and 10 C.F.R. § 50.68 allow the use of administrative controls to prevent criticality in fuel handling and storage,³² that the NRC endorsed ANSI/ANS 8.1, 1983, in Revision 2 to Regulatory Guide 3.4,³³ and that nothing in the governing regulations distinguishes between one-time and ongoing administrative controls.

Further, NNECO claims that the proven fuel handling procedures, as well as the practical implications of the proposed physical layout for the Unit 3 SFP, provide ample controls to ensure that fuel assemblies will be placed in appropriate regions in the SFP. NNECO further claims that the potential for boron dilution in the SFP has been addressed so that a dilution event is extremely unlikely at Millstone Unit 3; that criticality analyses show a substantial margin of safety; and that the Millstone recovery initiative has progressed to the point that past performance deficiencies have no bearing on the current ability of NNECO successfully to carry out administrative controls as required by the amendment at issue.

As set forth in the affidavits of Joseph J. Parillo and Michael C. Jensen,³⁴ NNECO argues that the proposed Unit 3 storage racks and regional storage system do not add significant complexity to the spent fuel storage system. The Staff observes that the proposed administrative controls only serve to augment the current procedures to the extent necessary to accommodate the fifteen new storage

²⁸NNECO Written Summary at 15, 17; Turner Affidavit ¶¶ 42-49. NNECO further asserts that its proposal is consistent with the intent of the Nuclear Waste Policy Act (NWPA), 42 U.S.C. § 10101 (1982), particularly § 131(a), 42 U.S.C. § 10151, where Congress finds that “the persons owning and operating civilian nuclear power reactors have the primary responsibility for providing interim storage of spent nuclear fuel from such reactors by maximizing, to the extent practical, the effective use of existing storage facilities at the site of each civilian nuclear power reactor, and by adding new onsite storage capacity in a timely manner where practical. . . .” In our opinion, this position of NNECO primarily reflects its motivation for expanding the capacity of its SFP and has no bearing on the question before us, NNECO’s ability to implement administrative controls safely.

²⁹Licensees have used administrative controls in essentially all burnup-dependent storage pools since the early 1980s. Kopp/Attard Affidavit ¶ 13.

³⁰First Cerne Affidavit ¶ 8.

³¹Section 4.2.1 of ANSI standard ANSI/ANS 8.1 states that criticality safety may be achieved by controlling one or more parameters of a system within subcritical limits and that control may be exercised administratively through procedures.

³²According to the Staff, 10 C.F.R. § 50.68 allows the use of administrative controls to prevent inadvertent criticality in fuel handling and storage. Specifically, 10 C.F.R. § 50.68(b)(1) allows a licensee to rely upon plant procedures to “prohibit the handling and storage at any one time of more fuel assemblies than have been determined to be safely subcritical under the most adverse moderation conditions feasible by unborated water.”

³³Kopp/Attard Affidavit ¶ 13; Reg. Guide 3.4 (March 1986); Staff Exh. 48.

³⁴Parillo Affidavit ¶ 6; Jensen Affidavit ¶ 11.

racks and changes in the regions.³⁵ As set forth by NNECO, the net effect will be to add two new burnup versus enrichment curves via Technical Specifications (TS) 3.9.3 and 3.9.4, in addition to the existing TS 3.9.1. Administrative procedures in place to comply with TS 3.91 will be replicated for TS 3.9.3 and 3.9.4.³⁶ Fuel assemblies (125 in number) currently stored in the SFP are qualified to be stored in either of the new regions 1 or 2 of the proposed configuration. Consequently, upon initial reconfiguration of the SFP, all the fuel assemblies will be in the correct locations. Subsequent storage will utilize the same procedures as used with the initial 125 assemblies.³⁷

Most significantly, the raw statistic of the frequency to date of fuel misplacements at the Millstone Units 2 and 3 SFPs is estimated by NNECO as 1 in 3000 (1/3000) moves.³⁸ According to the Staff, there have been no reportable instances of fuel misplacements at Millstone Unit 3.

With respect to the potential for boron dilution, on which CCAM/CAM rely to some extent, NNECO claims, through the affidavit of Robert G. McDonald, that there has never been a boron dilution event at Millstone station (§ 7); that the determination of boron concentration in the revised TS surveillance procedure will be no more complex or burdensome [than the current one] as a result of the proposed license amendment request (§§ 9, 11-16). Amendment 158 to the Unit 3 Technical Specifications on April 9, 1998, revised the Unit 3 SFP boron concentration surveillance frequency to every 72 hours whenever fuel assemblies are in the SFP; since that time, the largest observed change in boron concentration was a decrease of 49 parts per million (ppm) from December 1, 1999, to December 3, from a level of 2850 ppm. The change was attributed to evaporative makeup and normal sample accuracy (§ 10). Additionally, Mr. Parillo points out that it would take 500,000 gallons of unborated water to dilute the water in the SFP to 800 ppm boron from its normal level of 2600 ppm.³⁹ Further, overhead piping in the Millstone-3 SFP building does not go over the pool (Tr. 408), thus reducing the potential for a boron-dilution event.

Dr. Stanley Turner illustrates the degree of margin against exceeding criticality limits via a series of beyond-design-basis criticality analyses, summarized in Tables 1-3 of his affidavit.⁴⁰ These tables were generated using computer codes that have been extensively reviewed in peer-reviewed technical literature and which have been benchmarked against well-documented critical experiments. These results can be summarized as follows:

³⁵ Staff Written Summary at 37-38.

³⁶ Parillo Affidavit §§ 6-18; Jensen Affidavit §§ 12-35.

³⁷ Jensen Affidavit §§ 14-15.

³⁸ Parillo Affidavit § 41.

³⁹ *Id.* § 25.

⁴⁰ Turner Affidavit at 26-28.

For region 1, the regulatory limit of $k_{\text{eff}} \leq 0.95$ is exceeded only for the case of the entire rack filled with fresh fuel of 5% enrichment, accompanied by the loss of all soluble boron. The predicted k_{eff} in that case is 0.9728.

For region 2, the worst case occurs in the hypothetical event of the region being completely filled with fresh fuel of 5% enrichment, with the simultaneous loss of soluble boron to a level of 2000 ppm. In that case the $k_{\text{eff}} = 0.9842$.

In region 3, where there is no credit taken for fixed poison, there are a number of interesting beyond-design-basis events. If the region were entirely filled with fresh, 5% enriched fuel, the boron concentration would have to be about 1320 ppm to prevent criticality. (The k_{eff} is 0.9811 in this case.) Another configuration is that of eight fresh assemblies loaded into an otherwise empty rack; in that case the $k_{\text{eff}} = 0.9752$. Finally, the case of a single misplaced assembly composed of fresh fuel in a rack filled otherwise with spent fuel leads to $k_{\text{eff}} = 0.9707$ if all soluble boron were lost at the same time. Additionally, if both trains of SFP cooling were lost, the temperature of the pool could rise to the point (150°F) at which criticality would be achieved. (If as little as 30 ppm boron were available, this would not occur.)

In conjunction with these analyses, Dr. Turner notes that “[t]o the best of my knowledge, there have never been any incidents involving the mislocation of a fresh unburned assembly of high enrichment.”⁴¹

The progress of the Millstone recovery initiative is addressed by NNECO in the affidavit of David W. Dodson, who, in discussing the shutdown of all Millstone plants in 1996 and the subsequent recovery and restart proceedings, states:

Over a recovery period of more than two years, NNECO rebuilt its nuclear organization and programs with an emphasis on developing an improved safety culture, responding in a timely and constructive manner to adverse conditions and employee concerns, verifying and validating the design basis, and establishing program controls that would ensure compliance with NRC requirements into the future.⁴²

The details of the processes of recovery are described in ¶¶ 10-17, and the post-restart performance in ¶¶ 18-20. On this basis, Mr. Dodson finds the Intervenor’s fundamental premise that NNECO will not comply with administrative controls related to fuel handling and boron concentration “incomprehensible.”⁴³

The Staff likewise addresses the past violations and subsequent recovery initiative, finding that the December 1997 Notice of Violation “does not reference any spent fuel pool violations at Millstone Unit 3.” First Cerne Affidavit ¶ 6. The two incidents reported in 1994 and 1995 regarding errors in spent fuel pool movement were identified and corrected before any assemblies were stored in

⁴¹ *Id.* ¶ 66.

⁴² Dodson Affidavit ¶ 9.

⁴³ *Id.* ¶ 21.

an incorrect location (*id.*). With respect to a wider range of problems, the Staff states that “[p]rocedure quality and adherence had been a chronic problem since the early 1990s (Linville Affidavit ¶ 11). Following the shutdown and execution of the Restart Assessment Plan, NRC inspections found substantial improvement in procedure quality and adherence, and that the procedures were acceptable for restart (*id.* ¶¶ 12-13). Following restart in June 1998, oversight of the plant continued, with a conclusion in April 1999 that the plant had not yet demonstrated sustained, successful plant performance. Thus, Unit 3 was placed in the status of a regional-focus plant (*id.* ¶ 14). Continued improved plant performance led the Commission to close the order requiring third-party oversight on March 11, 1999 (*id.* ¶ 17). The plant was returned to normal oversight in May 2000, following demonstration of sustained, successful plant performance (*id.* ¶ 18). As part of the plant surveillance during RFO6, NRC inspectors noted the problems with the refueling machinery in Inspection Report 50-423/99-06 dated July 9, 1999. An excerpt from that report, referring to problems encountered with the refueling machinery, states:

We understand that your staff is developing longer-term corrective actions to reinforce station management’s configuration expectations and ensure that such events are not repetitive and do not result in more severe consequences.⁴⁴

The Staff further observes that the refueling machinery maintenance problems detected during RFO6 (and referenced by CCAM/CAM) will be repaired (or machinery replaced) prior to RFO7: “the licensee [NNECO] is currently proceeding with corrective action plans to replace both the Unit 3 fuel transfer system and SIGMA refueling machine prior to the start of the next refueling outage, scheduled for 2001.”⁴⁵

The Staff also states that nothing in the applicable regulations makes a distinction between one-time and ongoing administrative controls. Because human action is necessary to move fuel between the reactor and the storage facility, it is inescapable that administrative controls on fuel movement be used to ensure that the physical measures for preventing criticality are properly employed. To date, there have been no reported instances of criticality in an SFP in the United States.⁴⁶

Finally, the Staff points out that the administrative controls currently in place at Millstone-3 include TS 3.9.13, Figure 3.9-1 (NNECO Exh. 1, Attach. 1), the Millstone Nuclear Power Station Surveillance Procedure SP 3866, Rev. 3, “Spent Fuel Pool Boron Concentration, Nov. 8, 1996 (Staff Exh. 18); and

⁴⁴Second Cerne Affidavit ¶ 10; *see also* NRC Staff Exh. 11.

⁴⁵Second Cerne Affidavit ¶ 12.

⁴⁶Kopp/Attard Affidavit ¶¶ 15, 40.

Millstone Nuclear Power Station Surveillance Procedure SP 31022, Rev. 4, “Spent Fuel Pool Criticality Requirements,” Apr. 20, 1997 (Staff Exh. 19). According to the Staff, they are similar to those proposed in the amendment. These administrative controls have not resulted in any reportable instances of fuel assembly misplacements at Millstone Unit 3.⁴⁷

4. Licensing Board Conclusions on Contention 4

There is a two-part test established in 10 C.F.R. § 2.1115(b) for determining whether a full evidentiary hearing is warranted on a given contention:

- (1) There must be a genuine and substantial dispute of fact which can only be resolved with sufficient accuracy by the introduction of evidence in an adjudicatory hearing; and,
- (2) The decision of the Commission is likely to depend in whole or in part on the resolution of that dispute.

After an exhaustive review of the entire record on this contention, we conclude that Contention 4 fails the first test; hence we do not need to reach the second. We do not wish, however, to denigrate the importance, in terms of licensing, of the substantive questions raised by this contention.

At the heart of the matter is whether the revision of Millstone Unit 3’s Technical Specifications to include Figures 3.9-1, 3.9-3, and 3.9-4, detailing the limits on fuel placement, are so complex as to make fuel misplacement likely. Although expert testimony on the human factors involved in implementing the revised TS might be helpful, the parties’ arguments present no issue of fact to be resolved.

a. Fuel Misplacements

Intervenors’ claim that fuel misplacements do indeed occur is not disputed. However, close examination of the LERs cited by CCAM/CAM indicates that the regulatory limit on reactivity of 0.95 was not breached in either the *Byron* (CCAM/CAM Exh. 19), the *Farley* (CCAM/CAM Exh. 20), or the *McGuire* (CCAM/CAM Exh. 21) events.

In the *Byron* event, the three fuel elements of burnup 32,648, 32,638, and 32,728 Megawatt-days per tonne (MWd/t) were loaded in regions where the minimum burnups were 32,651, 32,651, and 32,771 MWd/t, respectively.⁴⁸ Because the

⁴⁷ *Id.* ¶ 16.

⁴⁸ Actually, only the first three digits are significant; the other figures represent bookkeeping carry-over.

burnup was essentially the same (within 0.1%) of the fuel rods already stored in the same regions, the reactivity limit of 0.95 was not challenged.⁴⁹

At *Farley*, three fuel elements were found to be misplaced. No details are given and the safety analysis simply states that the reactivity limit of 0.95 was not exceeded inasmuch as the boron concentration in the SFP was 2000 ppm.

At *McGuire Unit One*, on October 24, 1991, eleven fuel elements were found not to have been placed in a pattern allowing a vacant row between normal storage locations and a “checkerboarded” region. Using a Monte Carlo analysis, the plant staff found that the criticality limit of 0.95 was not exceeded, even without taking credit for the 2000 ppm boron in the SFP.

Another *McGuire Unit One* event, on August 10, 1994 (*see* CCAM/CAM Written Summary, Appendix B at B-23; CCAM/CAM Exh. B-11) invoked the inadvertent transfer of unborated water from the fuel transfer canal to the SFP. The event took place over 2 days, involving about 28,000 gallons of unborated water and resulted in lowering the boron concentration in the SFP from 2105 ppm to 1957 ppm. No criticality limits were exceeded, but the Technical Specification limit of 2000 ppm was violated.

The Intervenors also referred to the *Oyster Creek* event of January 21, 1987, in which fresh fuel of 3.19% was loaded into fresh fuel positions in the SFP. The array had only been qualified for fuel of 3.01% enrichment. This event was not a misplacement, because the fuel was where it was supposed to be. In any event, analysis showed that the criticality limit of 0.95 was not exceeded. (Indeed, because of the different configuration of the more highly enriched fuel, the array reactivity probably decreased.)

Finally, the April 26, 1994 incident at this reactor, *Millstone Unit 3*, involved an aborted attempt to load a fuel assembly into location N-7 instead of N-6, and did not involve loading an assembly into a region for which it was not qualified (Tr. 349), inasmuch as the two locations are in the same region. Further, whatever its significance, this event occurred prior to the 1996-1998 shutdown and restart of this reactor and thus does not necessarily reflect on the Licensee’s current capability for carrying out administrative controls properly.

Taking into account the relatively large number (more than fifty) of SFPs in the United States with administrative controls to provide for burnup credit, these errors are commensurate with the conservatively estimated error rate for Millstone of 1 per 3000 moves.⁵⁰

⁴⁹ One can estimate the change in reactivity from the approximate expression $\delta k/k = 1/4 \delta m/m$ where m is the mass of uranium. This approximate relationship is valid for typical LWR lattices. This yields an estimated change in reactivity of less than 0.00025; since there were other fuel assemblies loaded with more than the minimum required burnup, this estimate is a very conservative upper limit. *See* C.N. Kelber & R. Avery, “Physics Analysis of Proposals for EBWR Core 2,” ANL 6306 (1963).

⁵⁰ Parillo Affidavit ¶ 41.

b. Boron Dilution

Because the *Farley* event report relies on the boron concentration for the assertion that the reactivity limit of 0.95 was not exceeded, it is appropriate to consider the so-called boron-dilution (or boron-loss) event described by the Intervenors. The event happened at *Millstone Unit 2*: as described by counsel for NNECO, “that incident involved basically a two inch drop in the level and it was identified by a plant equipment operator even before the alarm level was reached” (Tr. 409). The Staff stated that it lasted 18 minutes (Tr. 438). Approximately 2370 gallons of borated water were transferred. The boron concentration was not reduced. This event patently does not qualify as a boron dilution event. Not only was the boron concentration not changed, but the plant safety systems worked as intended — the drop in water level was detected even before the alarm level was reached (Tr. 439).

c. Errors in Criticality Calculations

We turn now to the issue of errors in criticality calculations. Because the Intervenors specifically do not allege any errors in NNECO’s criticality calculations (Tr. 348), this matter is tangential to the contention. In the older case at *Millstone Unit 2*, there was a calculational error that was a mistake in calculating the effective epithermal capture cross-section of boron. The error was not in any way related to the use of complex administrative controls, or taking credit for burnup.

The error at *McGuire Units 1 and 2* on March 2, 2000, was related to accounting properly for the axial distribution of burnup. Initially, the licensee at *McGuire* used methods similar to those routinely used by the NRC Staff to perform criticality calculations, but neglected to correct these for the axial variation of burnup. The Staff (Kopp/Attard Affidavit at 19) claims to provide a correction to two-dimensional calculations to account for axial variation of burnup. Apparently this was not done during the initial NRC Staff review of *McGuire*. There was no case of exceeding the k_{eff} limit of 0.95. A reanalysis of hypothetical misloading accidents showed that the minimum boron concentration set in the Technical Specification should be changed to 460 ppm and 550 ppm for regions 1 and 2 of the SFP. Since the normal boron concentration is 2475 ppm, there was no appreciable change in the margin of safety.

d. Maintenance Problems

It is common knowledge that the Millstone plant has been plagued by many problems, including maintenance problems. The Affidavit of James C. Linville of the NRC Staff summarizes the history of this plant and details the efforts of

the NRC and NNECO to resolve these problems. On May 25, 2000, the NRC Staff testified to the Commission that “[v]ery good operational performance has been noted by the NRC over the past year at Millstone 3, . . . but the NRC will continue to follow Licensee and third party activities. . . .”⁵¹

With respect to the particular matters cited by the Intervenors with regard to RFO6, Mr. Cerne’s Second Affidavit, ¶ 12, states that “[t]he licensee is currently proceeding with corrective action plans to replace both the Unit 3 fuel transfer system and SIGMA refueling machine prior to the start of the next refueling outage, scheduled for 2001.”

Misoperation of the fuel transfer system imposes an economic penalty on NNECO; it does not affect the actual location of the fuel in the SFP. Hence, there is an economic incentive for NNECO to make the proposed repairs, and no safety significance if they do not.

e. Summary

We find that NNECO has demonstrated that it can adhere to administrative controls, with adequate safety margin and defense-in-depth, without posing an undue or unnecessary risk to plant workers or the public. The conservatively estimated error rate of fuel assembly misplacement of 1 in 3000 moves (or once every 9 years) is not high enough to characterize such an event as likely. Safety margins are maintained by the regulatory requirement that rack reactivity be less than 0.95, while the use of soluble boron adds defense-in-depth against an accidental criticality. Criticality calculations have used conservative assumptions, thereby introducing additional margin. We find, therefore, that, relative to Contention 4, there is no genuine and substantial dispute of fact or law that can only be resolved with sufficient accuracy by the introduction of evidence in an evidentiary hearing. As such, based on the record before us, we dispose of this contention as being resolved in favor of NNECO.

C. Contention 5

CCAM/CAM Contention 5, as admitted in LBP-00-2, 51 NRC at 34, reads as follows:

Significant Increase in Probability of Criticality Accident.

This contention, when admitted, was premised on a then-proposed technical-specification (TS) amendment that would have required surveillance of SFP

⁵¹ Linville Affidavit ¶ 18.

boron concentration only during times of fuel movement within the SFP. The TS specification, prior to amendment, required that soluble boron be maintained in the SFP at any time irradiated fuel assemblies are stored in the pool, that the minimum concentration would be 1750 ppm, and that surveillance be carried out every 72 hours.⁵² The contention read:

Will the proposed change in schedule of surveillance of the soluble boron in the fuel pool lead to a significantly increased likelihood of a criticality accident stemming from a misloaded fuel element, during the interval between fuel movements?

LBP-00-2, 51 NRC at 36.

Since the admission of that contention, and in part because of it, NNECO modified the proposed TS specifically to address the Intervenor's concerns. In an April 17, 2000 supplement to its application, NNECO submitted a modification to the proposed TS revisions that would amend TS 3.9.1.2 to require that soluble boron concentration be maintained at greater than or equal to 800 ppm whenever fuel assemblies are within the SFP. The modification also would amend TS 4.9.1.2 to require verification of the boron concentration every 7 days.⁵³

In their written summary, *see* CCAM/CAM Written Summary at 51-52, Intervenor's clearly stated that their concerns articulated in Contention 5 would be satisfied by implementation of the TS revisions proposed by NNECO on April 17, 2000. *See also* Oral Argument Tr. 330-337. CCAM/CAM expressed uncertainty, however, that the Staff would accept the proposed TS inasmuch as it had found no merit to the contention. The Intervenor's requested that no license amendment be issued in this proceeding unless it contains a requirement to verify the SFP's boron concentration at least once every 7 days. CCAM/CAM Written Summary at 51-52. At the oral argument, CCAM/CAM also raised questions whether the proposed surveillance requirement would actually be put into effect. Tr. 332. The Licensing Board stated that it would order the TS, as proposed by NNECO on April 17, 2000, and accepted by CCAM/CAM, and to which the Staff, at oral argument, offered no objection (Tr. 335), to be included in any amended license (assuming other aspects of the proposed change were found acceptable).⁵⁴ By this Order, we are directing that this TS be included in the license. This result appears to satisfy all parties to this proceeding.

⁵² Staff Written Summary at 44, *citing* Staff Exh. 1, Attach. 1 at 6.

⁵³ NNECO Exh. 2 at 1-2; NNECO Exh. 2, Attach. 1 at 1.

⁵⁴ According to CCAM/CAM, their acceptance of the boron monitoring condition was explicitly not an agreement that, contrary to their legal position on Contention 6, the presence of soluble boron in pool water can be relied on as a criticality prevention measure, under either normal or accident conditions. They state that any benefit of soluble boron can only be supplemental to a primary and sufficient set of criticality prevention measures that rely on physical systems or processes and which do not require support by ongoing administrative controls. CCAM/CAM Written Summary at 52.

D. Contention 6

CCAM/CAM Contention 6, as admitted in LBP-00-2, 51 NRC at 36, reads as follows:

Proposed Criticality Control Measures Would Violate NRC Regulations.

The basis that we accepted for litigation, and which gives substance to the contention, states:

GDC 62 [General Design Criterion 62] requires that: “Criticality in the fuel storage and handling system shall be prevented by physical systems or processes, preferably by use of geometrically safe configurations.” NNECO proposes to seek to prevent criticality at Millstone 3 by the use of ongoing administrative measures.

We went on to point out, in LBP-00-2, that, except with respect to identifying the precise administrative controls proposed to be utilized, as well as the existing administrative controls that would be superseded, the litigable issue posed by this contention essentially boils down to a question of law: “[d]oes GDC 62 permit a licensee to take credit in criticality calculations for enrichment, burnup, and decay time limits, limits that will ultimately be enforced by administrative controls?” LBP-00-2, 51 NRC at 41.

In their written summary, as well as at the oral argument, CCAM/CAM continue to treat this contention as a question of law.⁵⁵ They claim that the proposed license amendment fails to comply with GDC 62 because it improperly relies on administrative controls for criticality prevention. CCAM/CAM further claims that the license amendment application is inconsistent with NRC Staff guidance for analysis of criticality prevention measures.⁵⁶

1. Background for Claim

NNECO’s license-amendment proposal involves placing additional storage racks in the SFP. The new racks would be divided into two regions. Region 1 would store fuel in either a 3-out-of-4 array or 4-out-of-4 arrangement, depending on enrichment and burnup considerations. Region 2 would store fuel in a 4-out-of-4 arrangement, with more restrictive burnup/enrichment limitations than region 1. The new racks in both regions are to use Boral panels (fixed neutron absorbers). Finally, the existing storage racks would be redesignated as region 3, where fuel would be stored in a 4-out-of-4 array, subject to restrictive burnup/enrichment

⁵⁵The Licensee and NRC Staff agree with this characterization. NNECO Written Summary at 52-53; Tr. 494 (Licensee); NRC Staff Written Summary at 53.

⁵⁶CCAM/CAM Written Summary at 53-54.

decay limits.⁵⁷ These latter restrictive burnup/enrichment decay limits in region 3 are the primary administrative controls upon which CCAM/CAM's legal claims are focused.

2. Foundation for Claim

The Intervenors first claim that the GDC, appearing in 10 C.F.R. Part 50, Appendix A ("General Design Criteria for Nuclear Power Plants"), constitutes the minimum design criteria for nuclear power plants, that they are intended to provide basic guidance for the more detailed safety regulations, and that there are a variety of methods for demonstrating compliance with the GDC. But although allowing flexibility, the "fundamental principles of the GDC must be adhered to in choosing these methods."⁵⁸

CCAM/CAM claim that sole regulatory foundation for criticality controls in spent fuel pools (SFPs) is GDC 62 and that the plain language of that criterion requires the use of "physical systems or processes to prevent criticality" and thereby precludes the use of administrative controls. GDC 62 reads as follows:

Prevention of criticality in fuel storage and handling. Criticality in the fuel storage and handling system shall be prevented by physical systems and processes, preferably by use of geometrically safe configurations.

The types of administrative controls proposed by NNECO that CCAM/CAM find inconsistent with GDC 62 are (1) maintenance of a given content of soluble boron in the pool water; (2) limits on fuel enrichment/fuel burnup in region 1 4-out-of-4 racks and region 2 racks; and (3) limits on fuel enrichment/fuel burnup and fuel decay time in region 3 racks.⁵⁹ CCAM/CAM recognize that GDC 62 does not define the phrase "physical systems or processes," but claim it may be understood by reference to the single example provided of an acceptable physical system or process, a "geometrically safe configuration."⁶⁰

3. Definition of Administrative Controls

CCAM/CAM differentiate between types of administrative controls. In claiming that physical systems and processes are distinct in nature from ongoing administrative controls, they concede that any physical measure has some administrative component and any administrative measure has a physical

⁵⁷ NNECO Written Summary at 50, relying on Parillo Affidavit ¶¶ 7-12.

⁵⁸ CCAM/CAM Written Summary at 54 (citations omitted).

⁵⁹ LBP-00-2, 51 NRC at 37.

⁶⁰ CCAM/CAM Written Summary at 55.

component. On the one hand, they maintain that if a subcritical margin of reactivity is to be maintained in an SFP solely by use of a geometrically safe configuration, one-time administrative controls will be needed to ensure that the fuel racks provide the required configuration. After the racks are designed, fabricated, and installed, ongoing administrative controls would not be required. Similarly, if a subcritical margin of reactivity were to be maintained partly by exploiting the neutron-absorbing properties of the racks, then one-time controls would be needed to assure that those properties are provided — e.g., if Boral panels are attached to the racks, one-time controls will be needed to assure that the panels are properly designed, fabricated, and installed. Although periodic inspections may be needed to assure that the panels retain their needed properties, such inspections will be “comparatively straightforward.”⁶¹

In contrast, CCAM/CAM distinguish ongoing administrative controls requiring continuing actions by persons, such as inputting information into a computer system, and operating and maintaining equipment, which must be carried out throughout the period when criticality is possible, on a continuing, ongoing, and completely reliable basis. In particular, they observe that, if restrictions on fuel burnup/enrichment or fuel age are to be used — as here — as a means of criticality suppression, then ongoing administrative controls must ensure that a fuel assembly is never placed in the rack unless its burnup/enrichment level or age is within a specified range.

4. *Rulemaking History of GDC 62*

To support their reading of GDC 62 as precluding ongoing administrative controls, CCAM/CAM reviewed the rulemaking history of the regulation, finding it to make even more clear that the Commission intended to impose the fundamental requirement that criticality must be controlled by physical rather than administrative or procedural measures. According to CCAM/CAM, a set of draft General Design Criteria first appeared as an attachment to an Atomic Energy Commission (AEC) press release of November 22, 1965.⁶² Draft Criterion 25 proposed language that

The fuel handling and storage facilities must be designed to prevent criticality and to maintain adequate shielding and cooling for spent fuel under all anticipated normal and abnormal conditions, and credible accident conditions. Variables upon which health and safety of the public depend must be monitored.

⁶¹ *Id.* at 56.

⁶² *Id.* at 59-60; *see also* CCAM/CAM Exh. 30.

Following the receipt of comments from the AEC Staff and the Advisory Committee on Reactor Safeguards (ACRS), the AEC issued a revised draft on October 6, 1966, which included draft Criterion 10, stating:

Possibilities for inadvertent criticality must be prevented by engineered systems for processes to every extent practicable. Such means as geometric safe spacing limits shall be emphasized over procedural controls.⁶³

Another draft appears as a February 6, 1967 attachment to a February 8, 1967 letter from J. J. DiNunno of the AEC to Nunzio J. Palladino of the ACRS.⁶⁴ Criterion 61 of that draft read:

Possibilities for criticality in new and spent fuel storage shall be prevented by physical systems or processes to every extent practicable. Such means as favorable geometries shall be emphasized over procedural controls.

Shortly thereafter, a proposed appendix to 10 C.F.R. Part 50, setting forth the GDC, was published in the *Federal Register* for comment.⁶⁵ 32 Fed. Reg. 10,213 (1967). Proposed GDC 66 read as follows:

Criticality in new and spent fuel storage shall be prevented by physical systems or processes. Such means as geometrically safe configurations shall be emphasized over procedural controls.

Few substantive comments were submitted with respect to the proposed GDC. However, the Nuclear Safety Information Center, Oak Ridge National Laboratory (ORNL), commented as follows:

We do not understand the implication of “or processes” at the end of the first sentence, nor do we believe that it is practical to depend upon procedural controls to prevent accident criticality in storage facilities of power reactors. Hence, the last sentence of this criterion should be changed to read as follows: “Such means as geometrically safe configurations shall be used to insure that criticality cannot occur.”⁶⁶

The then-AEC thereafter issued another revision of the proposed GDC, commenting that the revised proposed GDC included “minimum requirements” for reactors, whereas the initial proposed criteria had been only “guidance.” The proposed revised GDC included GDC 62 as it reads today: i.e., “Criticality in

⁶³ CCAM/CAM Written Summary at 59, citing AEC memorandum from G. A. Arlotto to J. J. DiNunno and Robert H. Bryan, dated October 7, 1966, and attached Revised Draft of GDC for Nuclear Power Plant Construction Permits, dated October 4, 1966, both attached as CCAM/CAM Exh. 31. The same language appeared in an October 20, 1966 draft, attached to an October 25, 1966 letter from J. J. DiNunno to David Okrent of the ACRS, set forth as CCAM/CAM Exh. 32.

⁶⁴ CCAM/CAM Written Summary at 59-60; see also CCAM/CAM Exh. 33.

⁶⁵ CCAM/CAM Written Comments at 60; see also CCAM/CAM Exh. 35.

⁶⁶ CCAM/CAM Written Comments at 61; see also CCAM/CAM Exh. 36.

the fuel storage and handling systems shall be prevented by physical systems or processes, preferably by use of geometrically safe configurations.’’ As adopted in final form, the GDC includes the same language for GDC 62.⁶⁷

5. *Other Arguments*

After concluding that both the plain language and the rulemaking history of GDC supports their position that precludes reliance on ongoing administrative controls, CCAM/CAM claim that the plain language of GDC 62 is not altered or contradicted by other relevant NRC criticality standards but, indeed, is supported by them. They refer in particular to 10 C.F.R. §§ 70.24, 50.68, 72.124, and Draft Regulatory Guide (Reg. Guide) 1.13, or other NRC Staff Guidance.⁶⁸

(1) With respect to 10 C.F.R. §§ 70.24 and 50.68, CCAM/CAM state that, prior to 1998, NRC’s only criticality-related regulation for nuclear power plants was 10 C.F.R. § 70.24, requiring criticality monitoring for any licensee authorized to possess significant quantities of special nuclear material (SNM). Under this provision, Licensee’s could seek an exemption for good cause shown (10 C.F.R. § 70.24(d)).

According to CCAM/CAM, on December 3, 1997, the NRC concurrently published in the *Federal Register* a proposed rule and a direct final rule, making changes to section 70.24 and adding a new section 50.68. 62 Fed. Reg. 63,911 (1997) [proposed rule]; 62 Fed. Reg. 63,825 (1997) [direct final rule with opportunity to comment]. The purpose was asserted as being the elimination of case-by-case exemptions under section 70.24 (for those meeting the qualification-requirements set forth in the new section 50.68) and to establish a blanket exemption under section 50.68 for licensees that followed a set of criticality accident protection requirements.⁶⁹ According to CCAM/CAM, the discussion of safety in criticality control in the statement of considerations for section 50.68 made it clear that the finding of negligible risk set forth therein was ‘‘based in part on the assumption that during fuel storage, physical measures such as design features would be used to prevent criticality.’’⁷⁰

To establish this claim, CCAM/CAM then go on to cite a portion of the Statement of Considerations for 10 C.F.R. § 50.68 (emphasis added by CCAM/CAM):

At power reactor facilities with uranium fuel nominally enriched to no greater than five (5.0) percent by weight, the SNM in the fuel assemblies cannot go critical without both a critical configuration and the presence of a moderator. *Further, the fresh fuel storage array*

⁶⁷ CCAM/CAM Written Summary at 62; *see also* CCAM/CAM Exh. 38.

⁶⁸ CCAM/CAM Written Summary at 62-74.

⁶⁹ *Id.* at 63.

⁷⁰ *Id.*

*and the spent fuel pool are in most cases designed to prevent inadvertent criticality, even in the presence of an optimal density of unborated monitor. Inadvertent criticality during fuel handling is precluded by limitations on the number of fuel assemblies permitted out of storage at the same time. In addition, [GDC 62] reinforces the prevention of criticality in fuel storage and handling through physical systems, processes, and safe geometrical configuration. Moreover, fuel handling at power reactor facilities occurs only under strict procedural control. Therefore, the NRC considers a fuel-handling accidental criticality at a commercial nuclear plant to be extremely unlikely. The NRC believes the criticality monitoring requirements of 10 CFR 70.24 are unnecessary as long as design and administrative controls are maintained.*⁷¹

The Intervenors thus construe section 50.68 as affirming the language of GDC 62 which, under their reading, restricts criticality prevention measures to physical systems and processes and excludes the use of ongoing administrative controls. CCAM/CAM acknowledge that, although section 50.68 contains some references to procedures and “administrative measures” (certain of which they cite), such references do not undermine or contradict the general requirement of GDC 62 for physical criticality prevention measures.⁷² In particular, they construe the “administrative measures” referenced in 10 C.F.R. § 50.68(b)(4) (which relate to the storage of fuel in SFPs) as not undermining the basic requirement (in their view) that criticality be prevented without resort to administrative controls and without taking credit for soluble boron. Further, they note that the type of ongoing administrative measures proposed by NNECO (i.e., control of burnup/enrichment or fuel age) is neither condoned by nor even mentioned in 10 C.F.R. § 50.68).⁷³

(2) As for 10 C.F.R. § 72.124, that section relates, as CCAM/CAM point out, to the control of criticality at independent spent fuel storage installations (ISFSIs). According to the Intervenors, these regulations are inconsistent with GDC 62 inasmuch as they do *not* unequivocally require the use of physical systems or processes for criticality control and instead require a “practicability” standard. CCAM/CAM point out that, as recognized in the preamble to the ISFSI regulations, the design and operation of an ISFSI is fundamentally different from the design and operation of a nuclear power plant and dismiss these regulations as applicable only to ISFSIs and not to this type of proceeding.⁷⁴ For all of these reasons, CCAM/CAM reiterate that the administrative criticality prevention measures proposed by NNECO (including the presence of soluble boron to prevent criticality under accident conditions) would violate the “plain meaning and intent” of GDC 62.⁷⁵

⁷¹ *Id.* at 64-65, citing 62 Fed. Reg. at 63,825-26 (1997).

⁷² *Id.* at 65.

⁷³ *Id.* at 67-68.

⁷⁴ *Id.* at 68-70. CCAM/CAM add that 10 C.F.R. § 72.142(b), in their view, was not duly promulgated in compliance with the procedural requirements of the Administrative Procedure Act, *see* 5 U.S.C. § 553, and hence is entitled to no precedential value.

⁷⁵ CCAM/CAM Written Summary at 73.

(3) With regard to Draft Reg. Guide 1.13, CCAM/CAM assert that NNECO and the NRC Staff had earlier urged that reliance on administrative controls is permitted by Draft Reg. Guide 1.13. The Intervenor recognize a prior Commission statement to the effect that, if there is conformance with Reg. Guides, there is “likely to be compliance with the GDC.”⁷⁶ But they observe that, where there is inconsistency, the regulation is controlling. They conclude that, to the extent they permit use of administrative controls and procedures, Draft Reg. Guide 1.13 and “the Kopp Memorandum” (presumably CCAM/CAM Exh. 4,⁷⁷ although not otherwise identified) violate GDC 62.

(4) CCAM/CAM further criticize the Staff for its previously expressed reliance on its own past practice as justifying reliance on ongoing administrative controls to prevent criticality. The Intervenor claim that the Staff has followed this course without conducting any safety analysis to determine whether its “radical departure” from their view of the requirements of GDC 62 could be justified on safety grounds. CCAM/CAM deplore the absence of any such analysis and further conclude that the Staff, although advocating the so-called double contingency principle in evaluating criticality accidents, has made no attempt to determine what combinations of fuel handling or fuel management errors would violate that principle but, instead, has merely watered down the double contingency principle to a single contingency principle.⁷⁸ At oral argument, CCAM/CAM further both expressed disapproval of, and attempted to distinguish, a recent (May 2000) Licensing Board decision in the *Shearon Harris* proceeding that relied in part on past Staff practice in reading GDC 62 as permitting the use of administrative controls (Tr. 473, 482).⁷⁹

6. NNECO Position

Not surprisingly, NNECO takes a vastly different view concerning the permissibility of its using administrative controls. The Licensee recognizes the applicability of GDC 62, but it does not read GDC 62 as precluding the use of the type of administrative controls it is here proposing. NNECO instead asserts that credit for enrichment, burnup, and decay time limits (the types of administrative controls in question) involves a “physical system or process” as those terms appear in GDC 62 and thus are explicitly *permitted* by GDC 62.

There are essentially six parts to the Licensee’s argument. First, NNECO cites the recent *Shearon Harris* Licensing Board decision referenced above (LBP-00-

⁷⁶ *Id.* at 73-74, citing *Petition for Emergency and Remedial Action*, CLI-78-6, 7 NRC 400, 407 (1978).

⁷⁷ CCAM/CAM Exh. 4, Memorandum from Laurence Kopp, NRC, to Timothy Collins, NRC, re: Guidance on the Regulatory Requirements for Criticality Analysis of Fuel Storage at Light-Water Reactor Power Plants (Aug. 19, 1998).

⁷⁸ CCAM/CAM Written Statement at 74-76.

⁷⁹ See *Carolina Power & Light Co.* (Shearon Harris Nuclear Power Plant), LBP-00-12, 51 NRC 247 (2000).

12), which rejected a contention brought by the Intervenors in that proceeding (who utilized the same expert witnesses as used by CCAM/CAM) similar to the claim advanced here by CCAM/CAM.⁸⁰ The Licensing Board in *Shearon Harris* held, *inter alia*, that GDC 62 did not bar the use of administrative controls of the type here sought to be utilized by NNECO. NNECO particularly references the portions of *Shearon Harris* dealing with the regulatory history of GDC 62, the requirements of 10 C.F.R. § 50.68, the Draft Regulatory Guide 1.13 (Rev. 2), and the adjudicatory history of GDC 62.

Second, according to NNECO, credit for enrichment, burnup, and decay time limits involves a “physical system or process” fully consistent with GDC 62. The Licensee goes on to explain that there are four — and only four — methodologies for criticality control in SFPs: (1) geometric separation, (2) solid neutron absorbers (e.g., Boral, Boraflex), (3) soluble neutron absorbers (e.g., soluble boron), and (4) fuel reactivity limits (enrichment, burnup, and decay).⁸¹ NNECO portrays fuel reactivity as determined by three factors: (1) fuel assembly structure; (2) initial (“fresh”) fuel enrichment; and (3) fuel depletion (or “burnup”). Moreover, according to NNECO, *each* of the four types of criticality control measures is physical and involves (at some level) a “physical system or process,”⁸² and each requires administrative controls at some level. To NNECO, the issue of whether a criticality control measure is implemented by administrative controls is irrelevant under the GDC. The Licensee adds that it will employ all four methodologies to control criticality in the Millstone-3 SFP.⁸³

Third, NNECO claims that GDC 62 does not preclude the use of administrative controls.⁸⁴ The Licensee focuses on its view of the plain language of GDC 62, as well as arguments made by CCAM/CAM to the effect that fuel enrichment and burnup restrictions require — in implementation — administrative controls, which involve assuring that only fuel of the permitted reactivity is moved into a particular storage location, and that GDC 62 (in their view) prohibits such reliance.

Specifically, NNECO claims that nothing in the plain language of GDC 62 lends support to CCAM/CAM’s claim that reactivity limits or soluble boron are not permitted because these measures require some administrative measures to implement. The Licensee notes that the term “administrative controls” does not appear in GDC 62. NNECO adds that an interpretation of GDC 62 that

⁸⁰ NNECO acknowledges, however, that the legal interpretation adopted in *Shearon Harris* has not yet been reviewed by the Commission (Tr. 495) and thus does not constitute binding legal precedent for interpreting GDC 62 (NNECO Written Summary at 54). Although not binding precedent, NNECO portrays the decision as a “strong indicator that the identical CCAM/CAM Contention 6 also has no merit.” *Id.*

⁸¹ NNECO Written Summary at 52, 55.

⁸² *Id.* at 52.

⁸³ *Id.* at 55.

⁸⁴ *Id.* at 57.

would prohibit a method of criticality control because it requires administrative controls would not make sense in that all four methods of criticality control are implemented using some administrative measures.⁸⁵

Fourth, NNECO claims that reactivity limits and boron credit have been previously accepted by the Commission (or at least the Staff), establishing a long course of practice. NNECO reviews Staff practice over almost 20 years, including its approval of at least 20 license amendment requests to expand the capacity of SFPs where use of enrichment and burnup limits were adopted. NNECO explicitly reviews the history of Reg. Guide 1.13, the guidance of the April 14, 1978 letter from Brian K. Grimes, and the Staff's 1998 guidance memorandum on criticality control (all of which CCAM/CAM had also reviewed) and concludes, contrary to CCAM/CAM's interpretation, that all of these measures permit reliance on administrative controls.⁸⁶

Fifth, NNECO asserts that 10 C.F.R. § 50.68 affirms that the Commission permits administrative measures, fuel enrichment limits and fuel burnup limits for criticality control. The Licensee cites the rulemaking history and the regulation itself as demonstrating Commission endorsement of administrative measures to implement criticality control and permission for fuel reactivity limits and soluble boron credit to be used as methods of criticality control for spent nuclear fuel.⁸⁷

Finally, the Licensee claims, contrary to the assertion of CCAM/CAM, that the Commission's GDC rulemaking demonstrates no intent to preclude administrative controls. In reviewing the rulemaking history, details of which we need not here reiterate inasmuch as they are included in the position of CCAM/CAM which we previously have set forth, NNECO stresses that the Commission did not accept the 1967 ORNL comment that "processes" be deleted from the proposed "physical systems or processes." NNECO further stresses that the deletion of "procedural controls" from the proposed second sentence of the rule and the substitution of a "preference" for geometrically safe configurations does not signify an intent to preclude administrative controls but only a preference for geometrically safe configurations. *Id.* at 66.

7. *Staff Position*

The NRC Staff reaches the same legal conclusion on this contention as NNECO — i.e., that GDC 62 does not preclude administrative controls —

⁸⁵ *Id.* at 57-58.

⁸⁶ *Id.* at 60-63.

⁸⁷ *Id.* at 63-65.

but it reaches that result in a different way. It presents three basic arguments.⁸⁸

First, the Staff claims that the rulemaking history of GDC 62 does not support a prohibition of administrative controls. In reviewing that history — essentially the same events relied on by the Intervenors (described *supra*) — the Staff interprets it differently. The Staff in particular referenced the ORNL comments on the proposed rule, but emphasized the Staff view that deletion of the phrase “or processes” was inappropriate and that, although assurance of geometrically safe configurations was the preferable means for preventing criticality, procedural controls should not be ruled out. It points out that, given comments recommending against the inclusion of the phrase “physical systems or processes,” the AEC proceeded to include that very language. It also asserts that the use of administrative controls to aid in preventing criticality in SFPs has been approved in *Consumers Power Co.* (Big Rock Point Nuclear Plant), ALAB-725, 17 NRC 562 (1983). Finally, the Staff claims that, because human action is necessary to move fuel between the reactor and storage facilities, it is inescapable that administrative controls on the fuel movement be used to ensure that the physical measures for preventing criticality are properly employed. The Staff adds that it has authorized the use of credit for burnup for at least 18 years and there has never been a criticality accident in any SFP.

Second, the Staff asserts that the Commission itself has authorized the use of administrative controls relating to the prevention of criticality in SFPs. It references the 1998 approval process for 10 C.F.R. § 50.68, the explicit reference to administrative controls in 10 C.F.R. § 50.68 (b)(2) and (3), and the reference to soluble boron in 10 C.F.R. § 50.68(b)(4).

Third, the Staff claims there is no basis for CCAM/CAM’s theory that GDC 62 prohibits the use of ongoing administrative controls.⁸⁹ The Staff points out that the Intervenors have offered no regulatory, statutory, or scientific support — other than the “untested, unsupported” opinion of their witness, Dr. Gordon Thompson — for the theory that there are two categories of administrative controls, only one

⁸⁸ At the outset of its argument (Staff Written Summary at 29), the Staff claims that Intervenors’ expert witness, Dr. Gordon Thompson, should be disqualified as an expert witness and his testimony/declaration stricken from the record. The Staff reasons that the Intervenors have not demonstrated Dr. Thompson’s expertise in criticality control or any other issue related to the three admitted contentions. We reject that claim, for reasons similar to those assigned by the Licensing Board in the *Shearon Harris* SFP proceeding for dismissing a similar Staff claim. LBP-00-12, 51 NRC at 259-60. Without expressing any opinion as to the relative weight to be accorded to Dr. Thompson’s testimony (*vis-à-vis* that of other witnesses), we note that Dr. Thompson’s experience and training has some bearing upon the subject matter of this proceeding and that it is not necessary for a witness’s expertise to be precisely focused on the subject of the testimony to avoid being stricken. The weight to be accorded such testimony depends, of course, in part on the relative expertise of the witness compared to that of other witnesses.

The Staff also claims that the testimony/declaration of Intervenors’ other witness, David Lochbaum, should be given no weight, in that he has no training or experience in the area of human factors. We reject that claim for the same reason, noting also that none of the Staff witnesses is an expert in human factors.

⁸⁹ Staff Written Summary at 27.

of which (one-time controls) is acceptable under GDC 62.⁹⁰ The Staff adds that a large number (fifty or more) of SFPs operate in a mode similar to that proposed for Millstone-3, with very few incidents of fuel element misplacement and none of inadvertent criticality.⁹¹

8. Licensing Board Analysis

After reviewing the positions of each of the parties, we conclude that, contrary to the claim of CCAM/CAM, GDC 62 does not bar the types of administrative controls sought to be used by NNECO. Nor does any other regulation of which we are aware. Indeed, we agree with NNECO that such administrative controls are inherently comprehended within the phrase “physical systems and processes” that appears in GDC 62. For, as defined by the Merriam Webster *Third New International Dictionary*, the term “process,” used as a noun, means “an artificial or voluntary progressively continuing operation that consists of controlled actions or movements systematically directed toward a particular result or end”⁹² — with the end in this case being adequate criticality control, as set forth in GDC 62. It follows that there is no basis in law or language for differentiating between one type of administrative control and another. We thus adopt the same legal conclusion that was recently reached by the Licensing Board in the *Shearon Harris* proceeding, LBP-00-12, 51 NRC at 255-69.

We recognize, of course, that this interpretation of GDC 62 has never been explicitly endorsed by the Commission itself. The Appeal Board decision in *Big Rock Point*, ALAB-725, *supra*, relied on in part by the Staff but discounted

⁹⁰ *Id.* at 62.

⁹¹ *Id.* at 63-64, 64 n.30.

⁹² *Webster's Third New International Dictionary* 1808 (1981) defines “process” (used as a noun) as:

1a: a progressive forward movement from one point to another on the way to completion; 1b: continued onward flow; 1c: something (as a series of actions, happenings, or experiences) going on or carried on; 1d(1): a natural progressively continuing operation or development marked by a series of gradual changes that succeed one another in a relatively fixed way and lead toward a particular result or end; 1d(2): an artificial or voluntary progressively continuing operation that consists of a series of controlled actions or movements systematically directed toward a particular result or end; 1d(3): a set of facts, circumstances, or experiences that are observed and described or that can be observed and described throughout each of a series of changes succeeding each other; 1d(4): a succession of related changes by which one thing gradually becomes something else; 1e: a particular method or system of doing something, producing something, or accomplishing a specific result; 2a: the course of procedure in a judicial action or in a suit in litigation . . . [specific examples of use of the word in law]; 3. (Obsolete) report or account; 4. a part of the mass of an organism or organic structure that projects outward from the main mass; 5. (Obsolete) a royal edict; 6. (Roman Catholicism) the canonical procedure followed in beatification or canonization.

The definition numbered 1d(2) is most relevant to the term “processes” as used in GDC 62. Although some of the broader definitions apply in the sense that physical processes in an SFP may be described as a series of events, the only definition that clearly applies to an engineered system is 1d(2). In that connection, the term *artificial* clearly refers to an engineered system; the root “arte” means (in Latin) “by skill.” *Webster's Dictionary* at 122. The term *controlled*, *id.* at 496, also implies an engineered system. Nothing in the definition places limitations on the type of controls used.

by CCAM/CAM, is not directly in point.⁹³ Nor is the Staff's long-standing interpretation of GDC 62 controlling — the Staff could have been mistakenly interpreting the provision since its promulgation. The plain language of GDC 62 does not, by its terms, differentiate between the types of administrative controls that CCAM/CAM finds permissible or objectionable; nor does it bar the use of any type of administrative controls, either the one-time controls that CCAM/CAM would permit or the ongoing administrative controls that CCAM/CAM find objectionable.

The Intervenors read GDC 62 as expressing a preference for what they call “one-time” controls.⁹⁴ From the examples they cite, such as specifications of fuel assembly spacing, or the emplacement of Boral plates, it appears that they are referring to the class of autonomous controls. Such controls, once set in operation, do not require, as a regular event, external intervention. Speed governors, safety valves, etc. also fall into this category. The preference appears to be based on the notion that such controls are more reliable than controls that rely on continuing human action. While this inherent reliability may not always obtain (governors break, valves fail), in the present instance the preference appears to be well founded. But it is just that — a preference. Nothing in the language of the definition modifies the term “controlled.” GDC 62 does indeed express a preference for certain types of engineered systems: the Intervenors' desire to rely only on autonomous controls appears to be a natural extension of the preference set forth in GDC 62. But it is just that: a preference, not a prohibition. Thus, the “preference” in GDC 62 for “geometrically safe configurations” does not appear to us to be a bar to using other additional means for preventing criticality in SFPs. In that connection, the rulemaking history of GDC 62 suggests that, in adopting the rule in its current form, the Commission rejected the view of ORNL that took serious issue with any reliance upon ongoing administrative controls.

We further note that 10 C.F.R. § 50.68, which explicitly refers to administrative controls, does not govern the question before us here. As the Staff observes (Tr. 455-458), the provision deals with the need for criticality monitors and steps to be taken by a licensee to avoid use of such monitors in SFPs, but not with the criticality question before us now. But, according to the Staff, it does indicate that the Commission is knowledgeable in the use of administrative controls and has approved them in certain circumstances.

E. Conclusions

We have concluded, with respect to Contention 5, that the license condition agreed to by all parties with respect to boron surveillance and concentration

⁹³ Staff Written Summary at 58; CCAM/CAM Written Summary at 54 n.81.

⁹⁴ CCAM/CAM Written Summary at 56.

should be imposed on the amended license. With respect to Contentions 4 and 6, we have concluded that there are no significant factual disputes that would warrant a further evidentiary hearing. Thus, we are authorizing the Staff to issue an amended license authorizing expansion of the SFP at Millstone Unit 3, subject to its completion of its own review and subject to the condition concerning boron surveillance and concentration.

F. Order

Based on the foregoing discussion, and taking into account the entire record of this proceeding, it is, this 26th day of October 2000, ORDERED:

1. The license condition concerning boron concentration and surveillance, to which the parties have agreed, is hereby *adopted*.
2. The request of CCAM/CAM for a further evidentiary hearing on Contentions 4 and 6 is hereby *denied*. Those contentions are *resolved* as set forth herein.
3. This proceeding is hereby *terminated*.
4. This Memorandum and Order is effective immediately and, absent appeal, will become the final order of the Commission forty (40) days after date of issuance. *See* 10 C.F.R. §§ 2.760, 2.764. As provided by 10 C.F.R. § 2.786(b), within fifteen (15) days after service of this Memorandum and Order, any party may file a petition for review with the Commission on the grounds specified in 10 C.F.R. § 2.786(b)(4). Any such petition must conform to the requirements set forth in 10 C.F.R. § 2.786(b)(2). Any other party may, within ten (10) days after

service of a petition for review, file an answer supporting or opposing Commission review and conforming to requirements specified in 10 C.F.R. § 2.786(b)(3).

THE ATOMIC SAFETY AND
LICENSING BOARD

Charles Bechhoefer, Chairman
ADMINISTRATIVE JUDGE

Dr. Richard F. Cole
ADMINISTRATIVE JUDGE

Dr. Charles N. Kelber
ADMINISTRATIVE JUDGE

Rockville, Maryland
October 26, 2000

[Appendix A, “Oral Argument Transcript Corrections,” has been omitted from this publication but is available in ADAMS for public inspection at the Commission’s Public Document Room Located at One White Flint North, 11555 Rockville Pike, Rockville, MD.]

[Copies of this Memorandum and Order were transmitted this date by e-mail to counsel for each of the parties.]

UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

ATOMIC SAFETY AND LICENSING BOARD

Before Administrative Judges:

G. Paul Bollwerk, III, Chairman
Dr. Jerry R. Kline
Dr. Peter S. Lam

In the Matter of

Docket No. 72-22-ISFSI
(ASLBP No. 97-732-02-ISFSI)

PRIVATE FUEL STORAGE, L.L.C.
(Independent Spent Fuel Storage
Installation)

October 30, 2000

In this 10 C.F.R. Part 72 proceeding concerning the application of Private Fuel Storage, L.L.C. (PFS), for a license to construct and operate an independent spent fuel storage installation (ISFSI) on the reservation of the Skull Valley Band of Goshute Indians in Skull Valley, Utah, the Licensing Board denies the request of Intervenor State of Utah (State) for admission of late-filed contention Utah KK, Military Training Impacts, finding that a balancing of the five late-filing criteria found in 10 C.F.R. § 2.714(a)(1), does not warrant entertaining the contention.

RULES OF PRACTICE: NONTIMELY SUBMISSION OF
CONTENTIONS (GOOD CAUSE FOR DELAY)

To justify a presiding officer's consideration of the "merits" of a late-filed contention, i.e., whether the contention fulfills the admissibility standards specified in 10 C.F.R. § 2.714, a party must demonstrate that a balancing of the five factors set forth in section 2.714(a)(1)(i)-(v) supports acceptance of the petition. The first and foremost factor in this appraisal is whether good cause exists that will excuse the late-filing of the contention. *See Commonwealth Edison*

Co. (Braidwood Nuclear Power Station, Units 1 and 2), CLI-86-8, 23 NRC 241, 244 (1986).

RULES OF PRACTICE: NONTIMELY SUBMISSION OF CONTENTIONS (GOOD CAUSE FOR DELAY)

The good cause element has two components that impact on a presiding officer's assessment of the timeliness of the contention's filing: (1) when was sufficient information reasonably available to support the submission of the late-filed contention; and (2) once the information was available, how long did it take for the contention admission request to be prepared and filed. *See* LBP-99-3, 49 NRC 40, 46-48 (assessing late-filing factors relative to petition to intervene), *aff'd*, CLI-99-10, 49 NRC 318 (1999).

RULES OF PRACTICE: NONTIMELY SUBMISSION OF CONTENTIONS (BALANCING OF 10 C.F.R. § 2.714(a)(1) CRITERIA)

Relative to the other four factors, in the absence of good cause there must be a compelling showing on the four remaining elements, of which factors two and four — availability of other means to protect the petitioner's interest and extent of representation of petitioner's interest by other parties — are to be given less weight than factors three and five — assistance in developing a strong record and broadening the issues/delaying the proceeding. *See Braidwood*, CLI-86-8, 23 NRC at 244-45.

RULES OF PRACTICE: NONTIMELY SUBMISSION OF CONTENTIONS (NEPA ISSUES)

NEPA: ADMISSIBILITY OF LATE-FILED CONTENTIONS

An intervenor must file contentions on the basis of an applicant's environmental report and does not have good cause for delaying its filing until issuance of a Staff environmental document unless it establishes that new or different data or conclusions are contained in the Staff document. *Sacramento Municipal Utility District* (Rancho Seco Nuclear Generating Station), LBP-93-23, 38 NRC 200, 251 (1993), *petition for review and motion for directed certification denied*, CLI-94-2, 39 NRC 91 (1994); *see Cleveland Electric Illuminating Co.* (Perry Nuclear Power Plant, Units 1 and 2), LBP-82-79, 16 NRC 1116, 1118 (1982) (contention based on draft environmental statement that contains no new information relevant to the contention lacks good cause for late filing).

**RULES OF PRACTICE: NONTIMELY SUBMISSION OF
CONTENTION (SIGNIFICANCE VS. DELAY)**

The asserted “national significance” of an issue is not a compelling contributor to good cause in evaluating the timeliness of a late-filed contention. *See South Carolina Electric and Gas Co.* (Virgil C. Summer Nuclear Station, Unit 1), ALAB-642, 13 NRC 881, 887 n.5 (1981).

**RULES OF PRACTICE: NONTIMELY SUBMISSION OF
CONTENTIONS (NEPA ISSUES)**

NEPA: ADMISSIBILITY OF LATE-FILED CONTENTIONS

An intervenor that awaits the publication of a draft or final environmental impact statement before filing a contention does so “at its peril.” *See Louisiana Energy Services, L.P.* (Claiborne Enrichment Center), LBP-94-11, 39 NRC 205, 212 (1994).

**RULES OF PRACTICE: NONTIMELY SUBMISSION OF
CONTENTIONS (SOUND RECORD DEVELOPMENT)**

With regard to factor three — assistance in developing a sound record — it has been observed that when a petitioner addresses this criterion it should set out with as much particularity as possible the precise issues it plans to cover, identify its prospective witnesses, and summarize their proposed testimony. *Mississippi Power & Light Co.* (Grand Gulf Nuclear Station, Units 1 and 2), ALAB-704, 16 NRC 1725, 1730 (1982).

**RULES OF PRACTICE: NONTIMELY SUBMISSION OF
CONTENTIONS (SOUND RECORD DEVELOPMENT)**

When an intervenor does little more than identify affiants that support the contention, without providing any “real clue” about what they would say to support the contention, factor three provides little if any weight in favor of admitting the contention. LBP-98-7, 47 NRC at 208-09.

**MEMORANDUM AND ORDER
(Denying Request to Admit Late-Filed Contention Utah KK)**

In this 10 C.F.R. Part 72 proceeding concerning the application of Private Fuel Storage, L.L.C. (PFS), for a license to construct and operate an independent

spent fuel storage installation (ISFSI) located on the reservation of the Skull Valley Band of Goshute Indians in Skull Valley, Utah, Intervenor State of Utah (State) requests the admission of late-filed amended contention Utah KK, Military Training Impacts. With that contention, the State challenges the NRC Staff's draft environmental impact statement (DEIS) for failing to assess adequately the proposed ISFSI's cumulative and socioeconomic impacts resulting from a purported loss of military operations area airspace. Both PFS and the Staff oppose the State's request on a variety of grounds, including a failure to meet (1) the late-filing elements of 10 C.F.R. § 2.714(a)(1); and (2) the general admissibility requirements for contentions as set forth in section 2.714(b)(2), (d).

For the reasons set forth below, we deny the State's request to admit contention Utah KK, finding that a balancing of the five late-filing criteria of section 2.714(a)(1) do not support entertaining the contention.

I. BACKGROUND

PFS filed a license application for the proposed Skull Valley ISFSI in June 1997. *See* LBP-98-7, 47 NRC 142, 157, *reconsideration granted in part and denied in part*, LBP-98-10, 47 NRC 288, *aff'd*, CLI-98-13, 48 NRC 26 (1998). The PFS application, which consisted of a number of documents, included an environmental report (ER) addressing various issues relating to compliance with the requirements of the National Environmental Policy Act of 1969 (NEPA), 42 U.S.C. § 4321. *See* 47 NRC at 157. As the ER noted, the proposed ISFSI site is located near several military facilities, including Hill Air Force Base (HAFB), the Utah Test and Training Range (UTTR), and the Dugway Proving Ground (DPG). *See* [State] Request for Admission of Late-Filed Utah Contention KK (Potential Impacts to Military Training and Testing and State Economy) (July 27, 2000) at 1-2 [hereinafter State Contention Request]; [PFS] Response to [State] Request for Admission of Late-Filed Utah Contention KK (Aug. 10, 2000) at 2 [hereinafter PFS Response]. Although the PFS site is not situated directly in the UTTR, it is located beneath the airspace of the Sevier B military operating area (MOA), one of several such areas that border the edges of the UTTR and are located adjacent to restricted airspace. *See* PFS Response at 2. The Sevier B MOA is used for air-to-air combat training, weapons testing, and "flight ingress and egress to restricted airspace over the UTTR-DPG land mass." State Contention Request at 2.

Pursuant to an October 1997 Board order, in late-November 1997 the State filed its safety and environmental contentions relating to the PFS application. *See* LBP-98-7, 47 NRC at 160-61. One of these contentions, Utah K, Inadequate Consideration of Credible Accidents, included safety concerns regarding credible accidents at the PFS facility caused by external events that could potentially occur

as a result of the close proximity of military training facilities. *See id.* at 190. In April 1998, a number of the State's safety-related contentions, including Utah K, as well as contentions challenging the PFS ER, were eventually admitted for litigation in the proceeding.¹ *See id.* at 247-48.

More than 2 years later, on June 12, 2000, the Staff notified the Board and the parties to this proceeding that the DEIS relating to the PFS facility had been completed on June 9, 2000, and, if possible, copies of the DEIS would be distributed to the Board and the parties at the PFS ISFSI evidentiary hearing scheduled to begin on June 19, 2000, in Salt Lake City, Utah. *See* Letter from Robert M. Weisman, NRC Staff Counsel, to the Licensing Board (June 12, 2000). The Staff then supplied the State with a copy of the DEIS on June 19 at the evidentiary hearing.² *See* PFS Response at 3. The DEIS subsequently was made available to the public on June 23, 2000. *See* 65 Fed. Reg. 39,206 (2000). Thereafter, on July 27, 2000, the State requested the admission of late-filed contention Utah KK, Military Training Impacts, which provides:

The Draft Environmental Impact Statement fails to comply with the National Environmental Policy Act and 10 CFR § 51.71(d) because it does not adequately assess the cumulative and socioeconomic impacts from loss of military operations area airspace use, including a reduction in military readiness and national security, and potential socioeconomic impacts to Utah communities that rely on employment and patrons of military agencies that use the Sevier B military operating area.

State Contention Request at 3. In responses filed August 10, 2000, both PFS and the Staff contend that Utah KK should not be admitted in that it is (1) unjustifiably late, without a demonstration that the 10 C.F.R. § 2.714(a)(1) late-filing factors support its admission; and (2) unsupported by the necessary basis and does not demonstrate there is a dispute on a material issue of law or fact. *See* PFS Response at 5-15; NRC Staff's Response to "State of Utah's Request for Admission of Late-Filed Utah Contention KK (Potential Impacts to Military Training and Testing and State Economy)" (Aug. 10, 2000) at 4-16 [hereinafter Staff Response].

II. ANALYSIS

To justify a presiding officer's consideration of the "merits" of a late-filed contention, i.e., whether the contention fulfills the admissibility standards

¹In fact, Utah K was consolidated with related contentions from other intervenors to form contention Utah K/Castle Rock 6/Confederated Tribes B, which subsequently was redesignated as contention Utah K/Confederated Tribes B when one of the sponsoring parties withdrew from this litigation. *See* LBP-99-6, 49 NRC 114, 121 (1999).

²The State contends it received the DEIS "on or about June 21, 2000." State Contention Request at 8. This inconsistency regarding the precise date of receipt of the DEIS has no bearing on the timeliness of the filing of contention Utah KK.

specified in 10 C.F.R. § 2.714, a party must demonstrate that a balancing of the five factors set forth in section 2.714(a)(1)(i)-(v) supports acceptance of the petition. The first and foremost factor in this appraisal is whether good cause exists that will excuse the late-filing of the contention. *See Commonwealth Edison Co.* (Braidwood Nuclear Power Station, Units 1 and 2), CLI-86-8, 23 NRC 241, 244 (1986). And relevant to our evaluation of that factor here, as we have noted previously (albeit in a somewhat different context), the good cause element has two components that impact on our assessment of the timeliness of a contention's filing: (1) when was sufficient information reasonably available to support the submission of the late-filed contention; and (2) once the information was available, how long did it take for the contention admission request to be prepared and filed. *See LBP-99-3*, 49 NRC 40, 46-48 (assessing late-filing factors relative to petition to intervene), *aff'd*, CLI-99-10, 49 NRC 318 (1999). Moreover, relative to the other four factors, in the absence of good cause there must be a compelling showing on the four remaining elements, of which factors two and four — availability of other means to protect the petitioner's interest and extent of representation of petitioner's interest by other parties — are to be given less weight than factors three and five — assistance in developing a strong record and broadening the issues/delaying the proceeding. *See Braidwood*, CLI-86-8, 23 NRC at 244-45.

In connection with factor one — good cause for filing late — the State asserts that it first became aware of the proposed ISFSI's potential impacts on the military as a result of a May 3, 1999 letter to Utah Governor Michael Leavitt from HAFB Vice Commander Ronald Oholendt. At the end of that month, it filed supplemental EIS scoping comments to inform the Staff of those potential impacts. *See State Contention Request* at 8. The State argues that by taking these actions, it did not "idly" wait until the DEIS was published to make its concerns known, but adhered to the NEPA process by "timely making specific comments on the scope of the EIS," in the reasonable belief that the DEIS would address the cumulative and socioeconomic impacts of the proposed ISFSI. *Id.* Nor, according to the State, did it engage in any unreasonable delay in bringing its concerns to the attention of the Board. The State contends that because it received the DEIS during the June 2000 evidentiary hearings in Salt Lake City, it could not be expected to begin "copying and reviewing" the document until after the June 27 conclusion of the hearings. *Id.* Although acknowledging that it filed contention Utah KK more than 30 days from the date it contends it first received the DEIS, it nonetheless maintains that by filing the issue statement within 30 days of the conclusion of the evidentiary hearing it has provided the contention in a timely manner. *See id.* Additionally, the State argues that the Board should find good cause for admitting this contention as a result of the "national significance" of the issue in question. *Id.* at 8-9.

PFS argues that the State's filing of contention Utah KK on July 27, 2000, was 34 days after the June 23, 2000 date on which the DEIS was made public and, therefore, exceeded the 30 days allotted by the Board for the filing of DEIS-related late-filed contentions. *See* PFS Response at 6. Additionally, PFS contends that NRC precedent does not support the State's argument that the ongoing evidentiary hearing tolled the 30-day response period until the conclusion of the hearing. *See id.* at 6. Both PFS and the Staff also argue that contention Utah KK is unjustifiably late because the State had the requisite information to raise that issue statement by May 1999, and probably as early as November 1997. *See id.* at 7-9; Staff Response at 7-9.

Recognizing that the Staff would be issuing a DEIS and a final environmental impact statement (FEIS) relative to the PFS application that, in accordance with section 2.714(b)(2)(iii), could be the genesis of additional, late-filed contentions, in June 1998 the Board indicated that (1) the Staff should notify the intervening parties and the Board of its intent to make these documents public at least 15 days prior to their public issuance; (2) the Staff should take steps to notify the Intervenor of actual public release of these documents and their availability on an expedited basis; and (3) any late-filed contentions should be filed within 30 days of these documents being made available to the public. *See* Licensing Board Memorandum and Order (General Schedule for Proceeding and Associated Guidance) (June 29, 1998) at 4-5 (unpublished); *see also* LBP-00-7, 51 NRC 139, 143 n.1 (2000). The intent of the Board in setting these guidelines was twofold. First, we wished to ensure that intervening parties would have 15 days prior to the public release of the DEIS and the FEIS during which to secure the availability of their experts to review the documents immediately upon release. In addition, the Board wanted to provide a 30-day period for parties to prepare and file a response to those Staff environmental submissions. *See* Licensing Board Memorandum and Order (General Schedule for Proceeding and Associated Guidance) (June 29, 1998) at 5 (unpublished).

The Staff, however, did not adhere fully to these guidelines in that the intervenors were not provided with the full 15-day advance notification of the issuance of the DEIS.³ As a result, the 30-day period for submission of Intervenor late-filed contentions commenced on June 27, 2000 (i.e., 15 days after notice was given by the Staff that the DEIS was being made public), rendering filings made by July 27, 2000 timely. Thus, contention Utah KK was filed within the time allotted by direction of the Board for contentions relating to the DEIS.

³ A June 12, 2000 Staff letter to the Board and the parties advising that the DEIS was going to be made public was received by the State only 11 days prior to the June 23, 2000 date on which the DEIS was actually made public. As a result, the full 15-day advance notification specified by the Board was not afforded to the State and the other intervening parties.

This does not end the inquiry, however, for there is still the question of whether issuance of the DEIS was the appropriate trigger for the late-filing of contention Utah KK. In this regard we note that section 2.714(b)(2)(iii) provides in part:

On issues arising under the National Environmental Policy Act, the petitioner shall file contentions based on the applicant's environmental report. The petitioner can amend those contentions or file new contentions if there are data or conclusions in the NRC draft or final environmental impact statement, environmental assessment, or any supplements relating thereto, that differ significantly from the data or conclusions in the applicant's document.

This regulatory directive previously has been interpreted (and we think appropriately so) to mean that "as a matter of law, an intervenor must file contentions on the basis of an applicant's ER, and does not have good cause for delaying its filing until issuance of a Staff document unless it establishes that new or different data or conclusions are contained in the Staff environmental document." *Sacramento Municipal Utility District (Rancho Seco Nuclear Generating Station)*, LBP-93-23, 38 NRC 200, 251 (1993), *petition for review and motion for directed certification denied*, CLI-94-2, 39 NRC 91 (1994); *see Cleveland Electric Illuminating Co. (Perry Nuclear Power Plant, Units 1 and 2)*, LBP-82-79, 16 NRC 1116, 1118 (1982) (contention based on draft environmental statement that contains no new information relevant to the contention lacks good cause for late filing). The State does not establish or even contend that the Staff DEIS contains "new or different data or conclusions"; in fact, the State only asserts that certain concerns that were not dealt with in the ER have additionally not been dealt with in the DEIS. Indeed, it appears information was reasonably available to support contention Utah KK for a substantial period before the June 23, 2000 distribution of the DEIS. As is evidenced by the admitted portions of contention Utah K that relate to military training and testing, the State has been aware of the proposed PFS ISFSI's location under the Sevier B MOA portion of the UTTR since the filing of its first contentions in November 1997. Additionally, by its own admission, in May 1999 the State had information regarding "the significance of the potential impacts to the military" of the PFS facility by reason of the aforementioned May 1999 letter to Governor Leavitt. State Contention at 8. Finally, we do not find the State's "national significance" argument a compelling contributor to good cause. *See South Carolina Electric and Gas Co. (Virgil C. Summer Nuclear Station, Unit 1)*, ALAB-642, 13 NRC 881, 887 n.5 (1981).

An intervenor that awaits the publication of a DEIS or FEIS before filing a contention for which the intervenor has sufficient information does so "at its peril." *See Louisiana Energy Services, L.P. (Claiborne Enrichment Center)*, LBP-94-11, 39 NRC 205, 212 (1994). In this case, contention Utah KK could have been filed with the State's initial environmental contentions challenging the PFS ER or, at the very latest, in the May 1999 time frame following the Oholendt

letter. As a consequence, the State lacks the requisite good cause for its July 2000 submission of its concerns in connection with the Staff's issuance of the DEIS.

With the good cause factor thus placed in the balance against admission, the Board likewise finds that factors three and five — assistance in developing a strong record and broadening the issues/delaying the proceeding — do not weigh in favor of admitting contention Utah KK. With regard to factor three, it has been observed that “when a petitioner addresses this criterion it should set out with as much particularity as possible the precise issues it plans to cover, identify its prospective witnesses, and summarize their proposed testimony.” *Mississippi Power & Light Co.* (Grand Gulf Nuclear Station, Units 1 and 2), ALAB-704, 16 NRC 1725, 1730 (1982). In this case, the State identifies its prospective witnesses and asserts the qualifications of each, but does little in the way of summarizing the witnesses' planned testimony or identifying the matters the State wishes to address. As has been found in the past, when an intervenor does little more than identify affiants that support the contention, without providing any “real clue” about what they would say to support the contention, factor three provides little if any weight in favor of admitting the contention. *See* LBP-98-7, 47 NRC at 208-09.

In addition, factor five does not favor the admission of contention Utah KK either in that it would most certainly broaden the issues and delay the proceeding. Although there are some similarities between contentions Utah K and Utah KK, the safety issues relating to the occurrence of a potential accident identified in contention Utah K are significantly different from the concerns put forth in contention Utah KK regarding the environmental ramifications of the purported loss of military operations and airspace use that could potentially result from the construction of the proposed PFS ISFSI. Therefore, the issues in the proceeding would be broadened by the admission of this contention and the discovery and hearing time that would be required to litigate the broadened issues would almost certainly delay the proceeding.

As both PFS and the Staff acknowledge, factors two and four — availability of other means to protect the petitioner's interests and extent of representation of petitioner's interest by other parties — do favor the admission of contention Utah KK. Yet, the support for admission provided by these factors, which are afforded less weight than factors three and five, does not outweigh the previous three factors. As a result, because the section 2.714(a)(1) balancing process does not support the admission of late-filed contention Utah KK, we deny the State's request to admit this issue statement into this proceeding.⁴

⁴Our ruling on the late-filing criteria means we need not reach the question of this contention's admissibility under the section 2.714(b), (d) standards. Nonetheless, we note that we would have admitted contention Utah KK, with the additional observation that late-filing factor three and the basis and specificity requirement of section 2.714(b) are not necessarily synonymous.

III. CONCLUSION

Although filed within the Board-established deadline for the submission of late-filed contentions relating to the Staff's June 2000 DEIS, the substance of late-filed contention Utah KK could have been raised long before issuance of that environmental document, thus placing the cardinal good cause factor on the "inadmissible" side of the section 2.714(a)(1) balance. This deficiency, in combination with the fact that of the four remaining factors, the two that are more heavily weighted also do not support admission, establishes that a balancing of the late-filing criteria of section 2.714(a)(1) compel the rejection of late-filed contention Utah KK.

For the foregoing reasons, it is, this thirtieth day of October 2000, ORDERED that the State's July 27, 2000 request for the admission of late-filed contention Utah KK is *denied*.

THE ATOMIC SAFETY AND
LICENSING BOARD⁵

G. Paul Bollwerk, III
ADMINISTRATIVE JUDGE

Dr. Jerry R. Kline
ADMINISTRATIVE JUDGE

Dr. Peter S. Lam
ADMINISTRATIVE JUDGE

Rockville, Maryland
October 30, 2000

⁵Copies of this Memorandum and Order were sent this date by Internet e-mail transmission to counsel for (1) Applicant PFS; (2) Intervenors Skull Valley Band of Goshute Indians, Ohngo Gaudadeh Devia, Confederated Tribes of the Goshute Reservation, Southern Utah Wilderness Alliance, and the State; and (3) the Staff.

UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

ATOMIC SAFETY AND LICENSING BOARD

Before Administrative Judges:

G. Paul Bollwerk, III, Chairman
Dr. Jerry R. Kline
Dr. Peter S. Lam

In the Matter of

Docket No. 72-22-ISFSI
(ASLBP No. 97-732-02-ISFSI)

PRIVATE FUEL STORAGE, L.L.C.
(Independent Spent Fuel Storage
Installation)

October 30, 2000

In this 10 C.F.R. Part 72 proceeding concerning the application by Private Fuel Storage, L.L.C. (PFS), for a license to construct and operate an independent spent fuel storage installation (ISFSI) on the reservation of the Skull Valley Band of Goshute Indians in Skull Valley, Utah, the Licensing Board denies the request of Intervenor State of Utah (State) for admission of late-filed contentions Utah LL through Utah OO, which challenge aspects of the adequacy of the spent fuel transportation risk analysis in the NRC Staff's June 2000 draft environmental impact statement (DEIS), finding that a balancing of the five late-filing criteria found in 10 C.F.R. § 2.714(a)(1), does not warrant admitting the contentions.

RULES OF PRACTICE: NONTIMELY SUBMISSION OF
CONTENTIONS (NEPA)

NEPA: ADMISSIBILITY OF LATE-FILED CONTENTIONS

Section 2.714(b)(2)(iii) of Title 10 of the *Code of Federal Regulations* recognizes relative to National Environmental Policy Act (NEPA)-related contentions that, although a petitioner is to file its initial contentions based

on the applicant's environmental report, it can "amend those contentions or file new contentions if there are data or conclusions in the NRC draft or final environmental impact statement . . . or any supplements relating thereto, that differ significantly from the data or conclusions in the applicant's document." As the Commission recognized in adopting this provision, however, it was "not intended to alter the standards in § 2.714(a) of [the] rules of practice as interpreted by NRC caselaw, e.g., *Duke Power Co.* (Catawba Nuclear Station, Units 1 and 2), CLI-83-19, 17 NRC 1041 (1983), respecting late-filed contentions nor [is it] intended to exempt environmental matters as a class from the application of those standards." 54 Fed. Reg. 33,168, 33,172 (1989).

RULES OF PRACTICE: NONTIMELY SUBMISSION OF CONTENTIONS (BURDEN OF DEMONSTRATING ADMISSIBILITY)

An intervenor has the burden of demonstrating that its contentions merit admission in accordance with the five-factor balancing analysis specified in 10 C.F.R. § 2.714(a)(1).

RULES OF PRACTICE: NONTIMELY SUBMISSION OF CONTENTIONS (GOOD CAUSE FOR DELAY)

The first and foremost factor in the appraisal of 10 C.F.R. § 2.714(a)(1) is whether good cause exists that will excuse the late-filing of a contention. *See Commonwealth Edison Co.* (Braidwood Nuclear Power Station, Units 1 and 2), CLI-86-8, 23 NRC 241, 244 (1986).

RULES OF PRACTICE: NONTIMELY SUBMISSION OF CONTENTIONS (GOOD CAUSE FOR DELAY)

The good cause element has two components that impact on a presiding officer's assessment of the timeliness of a contention's filing: (1) when was sufficient information reasonably available to support the submission of the late-filed contention; and (2) once the information was available, how long did it take for the contention admission request to be prepared and filed. *See* LBP-99-3, 49 NRC 40, 46-48 (assessing late-filing factors relative to petition to intervene), *aff'd*, CLI-99-10, 49 NRC 318 (1999).

RULES OF PRACTICE: NONTIMELY SUBMISSION OF CONTENTIONS (BALANCING OF 10 C.F.R. § 2.714(a)(1) CRITERIA)

Relative to the other four factors, in the absence of good cause there must be a compelling showing on the four remaining elements, of which factors two and

four — availability of other means to protect the petitioner’s interest and extent of representation of petitioner’s interest by other parties — are to be given less weight than factors three and five — assistance in developing a strong record and broadening the issues/delaying the proceeding. *See Braidwood*, CLI-86-8, 23 NRC at 244-45.

RULES OF PRACTICE: NONTIMELY SUBMISSION OF CONTENTIONS (GOOD CAUSE FOR DELAY)

Section 2.714(a)(1) does not specify an exact time limit for the submission of late-filed contentions; accordingly, in the absence of some other Commission directive, the matter of timeliness is one for the presiding officer to resolve in the first instance. Certainly, this reflects a reasonable administrative choice given the myriad matters that could be the subject of late-filed issues and the differing circumstances in which they could arise.

RULES OF PRACTICE: NONTIMELY SUBMISSION OF CONTENTIONS (NEPA)

NEPA: ADMISSIBILITY OF LATE-FILED CONTENTIONS

The agency’s current rules of practice recognize that a DEIS or environmental impact statement can be a “triggering” document for late-filed contentions, giving these documents much the same status as the applicant’s environmental report that is the locus of any initial NEPA-related contentions.

RULES OF PRACTICE: CONTENTIONS (PLEADING IMPERFECTIONS)

Over the years, agency jurisprudence reflects a general reluctance to base the dismissal of contentions, late-filed or otherwise, on pleading or other procedural defects. *See Sequoyah Fuels Corp.* (Gore, Oklahoma Site Decontamination and Decommissioning Funding), LBP-94-8, 39 NRC 116, 120 & n.7 (citing *Houston Lighting and Power Co.* (South Texas Project, Units 1 and 2), ALAB-549, 9 NRC 644, 649 (1979)), *aff’d in part on other grounds*, CLI-94-12, 40 NRC 64 (1994); *see also Yankee Atomic Electric Co.* (Yankee Nuclear Power Station), CLI-96-1, 43 NRC 1, 5 (1996) (declining to dismiss intervention petition based on technical pleading defect).

RULES OF PRACTICE: SCHEDULING

The Commission recently has made it clear that it expects its presiding officers to set schedules, that parties will adhere to those schedules, and that presiding

officers will enforce compliance with those schedules. *See Statement of Policy on Conduct of Adjudicatory Proceedings*, CLI-98-12, 48 NRC 18, 21 (1998).

RULES OF PRACTICE: NONTIMELY SUBMISSION OF CONTENTIONS (OTHER MEANS AND OTHER PARTIES TO PROTECT INTERVENORS' INTEREST)

Lacking good cause with regard to a contention, the intervenor must make a compelling showing relative to the other four factors. With respect to factor two — availability of other means to protect the petitioner's interest — the ability to comment on the DEIS is not a trivial opportunity for involvement in the licensing process; however, it is not on the same plane as the participation rights that accrue in the adjudicatory context. *See Washington Public Power Supply System* (WPPSS Nuclear Project No. 3), ALAB-747, 18 NRC 1167, 1176-77 (1983) (ability to seek Staff 10 C.F.R. § 2.206 enforcement action relief not equivalent of adjudicatory participation in reactor operating license proceeding).

RULES OF PRACTICE: NONTIMELY SUBMISSION OF CONTENTIONS (SOUND RECORD DEVELOPMENT)

The fact that a witness supporting a late-filed contention previously has been involved in a proceeding, in and of itself, does not establish that the witness will contribute to the development of a sound record on a late-filed issue in the proceeding. *See Duke Power Co.* (Catawba Nuclear Station, Units 1 and 2), ALAB-813, 22 NRC 59, 85 (1985).

RULES OF PRACTICE: NONTIMELY SUBMISSION OF CONTENTIONS (SOUND RECORD DEVELOPMENT)

In assessing the third factor, the focus is on what specific information is provided by an intervenor relative to the contention at issue that allows the presiding officer fairly to conclude the party will contribute to the development of a sound record on that issue. And in this regard, the Commission has made it clear that a late-filed contention's proponent should, with as much particularity as possible, “ ‘identify its prospective witnesses, and summarize their proposed testimony.’ ” *Commonwealth Edison Co.* (Braidwood Nuclear Power Station, Units 1 and 2), CLI-86-8, 23 NRC 241, 246 (1986) (quoting *Mississippi Power & Light Co.* (Grand Gulf Nuclear Station, Units 1 and 2), ALAB-704, 16 NRC 1725, 1730 (1982)).

MEMORANDUM AND ORDER
(Denying Request to Admit Late-Filed Contentions
Utah LL Through Utah OO)

Pending with the Licensing Board is the August 2, 2000 request of Intervenor State of Utah (State) to admit contentions Utah LL through Utah OO, each of which challenges some aspect of the adequacy of the spent fuel transportation risk analysis in the NRC Staff's June 2000 draft environmental impact statement (DEIS) regarding the proposed Skull Valley, Utah independent spent fuel storage installation (ISFSI) of Applicant Private Fuel Storage, L.L.C. (PFS). Specifically, with these four contentions the State asserts that the DEIS is deficient in its discussion of (1) the impacts of intermodal transfer from trucks to railheads near reactor sites; (2) the type of cask transportation rail cars that will be used and the accident risks associated with the heavy loads they will carry; (3) severe accident probability and consequences; and (4) maximum credible accident environmental impacts, including economic risks and consequences. Applicant PFS contends that we should reject all four contentions because they fail to merit admission under both the late-filing and the basis and specificity criteria of 10 C.F.R. § 2.714(a)(1), (b), (d). For its part, the Staff objects to the admission of contentions Utah OO and a portion of contention Utah NN as not meeting the section 2.714(a)(1) late-filing criteria and questions the admissibility of all four contentions under the basis and specificity requirements of section 2.714(b), (d).

For the reasons set forth below, we find that the contentions are not admissible under a balancing of the late-filing elements of 10 C.F.R. § 2.714(a)(1).

I. BACKGROUND

In the Board's initial ruling on the admissibility of the State's timely filed contentions, we found admissible that portion of the State's National Environmental Policy Act (NEPA)-related contention Utah V, Inadequate Consideration of Transportation-Related Radiological Environmental Impacts, that "alleges the weight for a loaded PFS shipping cask is outside the parameters of 10 C.F.R. § 51.52 (Summary Table S-4)." LBP-98-7, 47 NRC 142, 200, *reconsideration denied*, LBP-98-10, 47 NRC 288, 295-96, *aff'd on other grounds*, CLI-98-13, 48 NRC 26 (1998). As adopted in that decision, admitted contention Utah V provides:

The Environmental Report ("ER") fails to give adequate consideration to the transportation-related environmental impacts of the proposed ISFSI in that PFS does not satisfy the threshold condition for weight specified in 10 C.F.R. § 51.52(a) for use of Summary Table S-4, so that the PFS must provide "a full description and detailed analysis of the environmental effects

of transportation of fuel and wastes to and from the reactor'' in accordance with 10 C.F.R. § 51.52(b).

Id. at 256.

As the language of the contention indicates, this State issue statement used as its basis the environmental report that PFS submitted as part of its July 1997 application for authorization to construct and operate its proposed Skull Valley, Utah ISFSI. Thereafter, recognizing that the NRC Staff would be issuing a DEIS and a final environmental impact statement (FEIS) relative to the PFS application that, in accordance with 10 C.F.R. § 2.714(b)(2)(iii), could be the genesis of additional, late-filed contentions, the Board indicated that (1) the Staff should notify the intervening parties and the Board of its intent to make these documents public at least 15 days prior to their public issuance; (2) the Staff should take steps to notify the Intervenor of actual public release of these documents and their availability on an expedited basis; and (3) any late-filed contentions should be filed within 30 days of these documents being made available to the public. *See* Licensing Board Memorandum and Order (General Schedule for Proceeding and Associated Guidance) (June 29, 1998) at 4-5 (unpublished); *see also* LBP-00-7, 51 NRC 139, 143 n.1 (2000).

On June 16, 2000, a DEIS was issued by the Staff and several cooperating federal agencies (i.e., the Bureau of Indian Affairs and the Bureau of Land Management of the United States Department of the Interior and the United States Surface Transportation Board). *See* Office of Nuclear Material Safety and Safeguards, U.S. Nuclear Regulatory Comm'n, Draft Environmental Statement for the Construction and Operation of an [ISFSI] on the Reservation of the Skull Valley Band of Goshute Indians and the Related Transportation Facility in Tooele County, Utah, NUREG-1714 (June 2000) [hereinafter DEIS]; *see also* 65 Fed. Reg. 39,206 (2000). Copies of DEIS were provided to the Board and the State during an evidentiary hearing session held in Salt Lake City, Utah, on Monday, June 19, 2000. *See* Tr. at 1387.

The State's request to admit late-filed contentions Utah LL through Utah OO were filed with the Board on August 2, 2000. *See* [State] Request for Admission of Late-Filed Contentions Utah LL Through OO (Aug. 2, 2000) [hereinafter State Contentions]. These contentions provide as follows:

Contention Utah LL. The DEIS fails to comply with the requirements of 10 CFR § 51.70 and NEPA in that it underestimates the risks posed by transportation of spent fuel to the PFS facility, because it ignores elements of the project which affect the transportation risks. Specifically:

1. The DEIS ignores the impacts of incident-free transportation that result from the loading of fuel and from the intermodal transfer from trucks to railheads near reactor sites.

* * * *

2. The DEIS does not describe the type of railroad cars to be used for transporting casks to the PFS facility, or evaluate the accident risks posed by putting extremely heavy loads on the rails.

* * * *

Contention Utah MM. The DEIS does not comply with the requirements of NEPA or 10 CFR § 51.70 because it underestimates the risk of the most severe category of accident by understating both the probability and the consequences.

The most severe transportation accident considered in the DEIS is a “Severity Category 6” accident, involving “[s]evere impact damage plus fire severe enough to cause fuel oxidation with release of greater amounts of fuel particulates than category 5.” DEIS at D-6, Table D.2. The DEIS estimates that the probability of an accident of this severity is 1×10^{-12} per mile for shipment by rail. DEIS at D-7. Specifically,

1. The DEIS employs the average rail accident rate, not the rail accident rate for specific rail lines that will be used.

* * * *

2. The probability of a severe accident is higher than estimated in the DEIS.

* * * *

3. The DEIS underestimates the radiological consequences of a Severity Category 6 accident, by underestimating the release fraction for [Chalk River Unidentified Deposits (CRUD)].

* * * *

Contention Utah NN. The DEIS fails to comply with the requirements of 10 CFR § 51.70 and NEPA in that it does not describe or analyze the environmental impacts of a maximum credible accident.

* * * *

Contention Utah OO. The DEIS fails to comply with the requirements of 10 CFR § 51.70 or NEPA in that it does not address economic risks or consequences of a transportation accident.

State Contentions at 9, 12, 13, 14, 17, 20, 22. PFS and Staff responses objecting to admission of these late-filed issue statements were lodged on August 30, 2000.¹ See [PFS] Response to [State] Request for Admission of Late-Filed Contentions Utah LL Through OO (Aug. 30, 2000) [hereinafter PFS Response]; NRC Staff’s Response to [State] Request for Admission of Late-Filed Contentions Utah LL Through OO (Aug. 30, 2000) [hereinafter Staff Response]. Thereafter, with leave of the Board, the State filed a reply to the PFS and Staff responses and, as part of that filing, included a motion to amend late-filed contention Utah LL to include a citation it asserts was inadvertently left out. See [State] Reply to [PFS] and Staff’s

¹The State labeled its pleading as proprietary because of its concern about the status of Exhibit 2 to its motion, a June 16, 1998 letter to PFS that was marked confidential. See State Contentions at 12-13 & Exh. 2. In its response, PFS indicated that the letter did not need to be afforded confidential treatment. See [PFS] Response to [State] Request for Admission of Late-Filed Contentions Utah LL Through OO (Aug. 30, 2000) at 8 n.10. Accordingly, we see no basis for withholding any portion of this decision from the public record.

Responses to Late-Filed Contentions Utah LL Through OO and Motion to Amend Contention LL (Sept. 7, 2000) [hereinafter State Reply]. By responses dated September 14, 2000, both PFS and the Staff opposed the contention Utah LL amendment request. *See* [PFS] Response to [State] Motion to Amend Contention Utah LL (Sept. 14, 2000); NRC Staff's Response to [State] Motion to Amend Contention Utah LL (Sept. 14, 2000). The State, however, responded with a motion to strike a portion of the Staff's response as providing further arguments regarding the merits of admitting the contentions, rather than the amendment requested by the State. *See* [State] Motion To Strike Part of The Staff's Response to [State] Motion To Amend Late-Filed Contention Utah LL (Sept. 18, 2000). The Staff then submitted a response opposing the State's motion to strike, as well as its own motion to strike certain portions of the State's reply/motion to amend, which prompted a State response asserting the Staff's motion to strike should be denied. *See* NRC Staff's (1) Response to "[State] Motion to Strike Part of the Staff's Response to [State] Motion to Amend Late-Filed Contention Utah LL," and (2) Motion to Strike Portions of the [State] Reply/Motion to Amend (Sept. 25, 2000); [State] Response to NRC Staff's Motion to Strike Portions of the State's Reply/Motion to Amend (Sept. 28, 2000).

II. ANALYSIS

A. Late-Filing Criteria

1. *Applicable Standard*

Section 2.714(b)(2)(iii) of Title 10 of the *Code of Federal Regulations* recognizes relative to NEPA contentions that, although a petitioner is to file its initial contentions based on the applicant's ER, it can "amend those contentions or file new contentions if there are data or conclusions in the NRC draft or final environmental impact statement . . . or any supplements relating thereto, that differ significantly from the data or conclusions in the applicant's document." As the Commission recognized in adopting this provision, however, it was "not intended to alter the standards in § 2.714(a) of [the] rules of practice as interpreted by NRC caselaw, e.g., *Duke Power Co.* (Catawaba Nuclear Station, Units 1 and 2), CLI-83-19, 17 NRC 1041 (1983), respecting late-filed contentions nor [is it] intended to exempt environmental matters as a class from the application of those standards." 54 Fed. Reg. 33,168, 33,172 (1989). Thus, notwithstanding the fact that the Staff DEIS that is the purported genesis for the State's four late-filed spent fuel transportation contentions was not put before the Board and the parties until June of this year, because the deadline in this proceeding for filing timely contentions expired nearly 3 years ago, the State has the burden of demonstrating

that its contentions Utah LL through Utah OO merit admission in accordance with the five-factor balancing analysis specified in 10 C.F.R. § 2.714(a)(1).

The first and foremost factor in this appraisal is whether good cause exists that will excuse the late-filing of the contention. *See Commonwealth Edison Co.* (Braidwood Nuclear Power Station, Units 1 and 2), CLI-86-8, 23 NRC 241, 244 (1986). And relevant to our evaluation of that factor here, as we have noted previously (albeit in a somewhat different context), the good cause element has two components that impact on our assessment of the timeliness of a contention's filing: (1) when was sufficient information reasonably available to support the submission of the late-filed contention; and (2) once the information was available, how long did it take for the contention admission request to be prepared and filed. *See LBP-99-3*, 49 NRC 40, 46-48 (assessing late-filing factors relative to petition to intervene), *aff'd*, CLI-99-10, 49 NRC 318 (1999). Moreover, relative to the other four factors, in the absence of good cause there must be a compelling showing on the four remaining elements, of which factors two and four — availability of other means to protect the petitioner's interest and extent of representation of petitioner's interest by other parties — are to be given less weight than factors three and five — assistance in developing a strong record and broadening the issues/delaying the proceeding. *See Braidwood*, CLI-86-8, 23 NRC at 244-45.

2. *Application to State's Late-Filed Contentions Utah LL Through Utah OO*

Turning to the application of the section 2.714(a)(1) balancing test, we begin by considering the first and paramount factor, good cause for late filing. In connection with the two aspects of timeliness outlined above, PFS declares that the matters that are the subject of Contentions Utah LL through Utah OO could have been raised in November 1997 based on the PFS ER or, in the case of Utah LL, basis two, in late 1998 when PFS provided a document that is central to this State claim, and, as such, lack good cause at this juncture. *See* PFS Response at 7-10. The Staff takes a somewhat different tack, declaring that the portion of Utah NN that alleges the DEIS is deficient because of a failure to include a discussion of the economic consequences of a maximum credible spent fuel transportation accident, and all of Utah OO, which asserts the DEIS fails to contain any discussion of the economic risks or consequences of a spent fuel transportation accident, could have been raised in 1997 based on the PFS ER and thus fail the good cause standard. *See* Staff Response at 9-11. The State asserts that all these contentions meet this aspect of the good cause standard based on the fact that, in conformity with section 2.714(b)(2)(iii), the DEIS differs "significantly" from the ER on the points raised in each. *See* State Contentions at 3-7, 25-26; *see also* State Reply at 22-23.

On this aspect of the good cause element, we agree with the Staff that the economic concerns in contentions Utah NN and Utah OO could have been raised relative to the ER back in 1997. On the other hand, the State is correct in asserting that the DEIS information upon which contentions Utah LL, Utah MM, and the balance of Utah NN are based was substantially different from the ER such that the good cause factor would not weigh against their filing at this time.

This does not end the matter, however. Relative to the other factor — how promptly were the contentions filed once the requisite information was in hand — we note that all four share a common filing date: August 2, 2000. Although the Staff does not discuss this aspect of the balancing equation, Applicant PFS asserts that (1) all these contentions are late under the terms of the Board’s June 28, 1998 scheduling directive; and (2) the State has failed to provide any reason that excuses its tardiness. We consider each of these points in turn.

To be sure, section 2.714(a)(1) does not specify an exact time limit for the submission of late-filed contentions; accordingly, in the absence of some other Commission directive, the matter of timeliness is one for the presiding officer to resolve in the first instance. Certainly, this reflects a reasonable administrative choice given the myriad matters that could be the subject of late-filed issues and the differing circumstances in which they could arise. Indeed, in this proceeding we have been called upon to make such findings in a number of different instances. *See, e.g.*, LBP-00-14, 51 NRC 301 (2000); LBP-98-29, 48 NRC 286 (1998). And in this context, we have provided general guidance that 45 days approaches the outer boundary of timeliness. *See* LBP-99-3, 49 NRC at 47.

Our June 28, 1998 scheduling directive, however, reflected a somewhat different, although not inconsistent, approach to this question of timing. As was noted above, the agency’s current rules of practice recognize that a DEIS or EIS can be a “triggering” document for late-filed contentions, giving these documents much the same status as the Applicant’s environmental report (ER) that is the locus of any initial NEPA-related contentions. Given the clear existence of these “triggering” documents, as was the case with the initial contentions, we directed that contentions relating to the DEIS or the EIS be filed by a date certain, i.e., within 30 days of the public release of those documents. However, in setting this deadline, we also endeavored to address the often-expressed concern that technical consultant availability is a significant component of any contention preparation time allotment. Consequently, we directed that the Staff should provide at least 15 days advance notice of its intent to make these documents publically available, thereby giving the other participants an opportunity to put their existing technical consultants “on alert” that their services would be needed or retain new consultants so that, with the public availability of the document, they could begin working promptly. Indeed, we recently emphasized the importance of this element, noting that we would take into account a Staff failure to follow

our pre-issuance notice directive in terms of any finding about timeliness relative to late-filed contentions on the DEIS or EIS. *See* LBP-00-7, 51 NRC at 143 n.1.

Taking our timing directive and applying it to this case, the Staff gave the requested pre-issuance notice on June 12, 2000, by means of a letter that was sent to the Licensing Board and all parties by e-mail that date. *See* Letter from Robert Weisman, NRC Staff Counsel, to the Licensing Board (June 12, 2000). The letter indicated that the DEIS had been completed on June 9, 2000, but was in reproduction and would be made available to the parties at the scheduled June 19, 2000 evidentiary hearing session. Thereafter, copies of the DEIS were made available to the parties on June 19, 2000, *see* Tr. at 1387, although the public was not officially notified of its availability until June 23, 2000, *see* 65 Fed. Reg. 39,206 (2000). In this circumstance, consistent with our scheduling directive contemplation that there would be 45 days between the time of the Staff pre-issuance notice and the time any late-filed contentions on the DEIS were due and that the parties would have the DEIS in hand for at least 30 days before any contentions were due to be filed, the due date for late-filed contentions regarding that document was July 27, 2000 (i.e., 45 days from June 12, 2000). As a consequence, the State's request for late-filed admission of contention Utah LL through Utah OO, which was filed on August 2, 2000, is 6 days late.

In seeking to justify the late filing of its contentions Utah LL through Utah OO, the State puts forth a variety of reasons it contends demonstrate good cause, including (1) counsel's participation in the evidentiary hearing until June 27; (2) ongoing preparation of proposed findings of fact and conclusions of law relative to the three issues heard during June 2000; (3) counsel's preparation of DEIS-related contention Utah KK, which was filed on time, *see* LBP-00-27, 52 NRC 216, 222 (2000); (4) the fact there were two holidays (one federal, one Utah state) during this period; (5) the complexity of the issues involved; (6) the State's efforts to raise environmental transportation-related concerns on numerous occasions; and (7) the fact that its untimely filing of these contentions does not affect the schedule for the proceeding. *See* State Contentions at 24-25. In response, PFS declares that these items do not excuse the lateness of the State's filing because (1) during the evidentiary hearing and the drafting of proposed findings and conclusions, Dr. Marvin Resnikoff, who provided the sole expert support for contentions Utah LL through Utah OO, was available to review and analyze the DEIS; and (2) parties to NRC adjudications are expected to accept the burdens attendant upon such participation, including meeting filing deadlines. *See* PFS Response at 4-5 (citing *Duke Energy Corp.* (Oconee Nuclear Station, Units 1, 2, and 3), CLI-99-11, 49 NRC 328, 338-39 (1999)). In reply, the State expresses its regret that it did not recall the Board's scheduling order setting a 30-day filing deadline, noting that its counsel was in the midst of the June evidentiary hearing and preparation of its proposed findings and conclusions. It also asserts that the fact its expert Dr. Resnikoff was not involved in the evidentiary hearing was not a relevant

factor given the need to have its counsel, who were otherwise occupied with hearing-related matters, available to draft the contentions and consult with the expert. Finally, the State declares that its delay in filing its contention will have no appreciable effect on any hearing for these contentions, which would not occur until the summer of 2001. *See* State Reply at 20-21.

Over the years, agency jurisprudence reflects a general reluctance to base the dismissal of contentions, late-filed or otherwise, on pleading or other procedural defects. *See Sequoyah Fuels Corp.* (Gore, Oklahoma Site Decontamination and Decommissioning Funding), LBP-94-8, 39 NRC 116, 120 & n.7 (citing *Houston Lighting and Power Co.* (South Texas Project, Units 1 and 2), ALAB-549, 9 NRC 644, 649 (1979)), *aff'd in part on other grounds*, CLI-94-12, 40 NRC 64 (1994); *see also Yankee Atomic Electric Co.* (Yankee Nuclear Power Station), CLI-96-1, 43 NRC 1, 5 (1996) (declining to dismiss intervention petition based on technical pleading defect). At the same time, the Commission recently has made it clear that it expects its presiding officers to set schedules, that parties will adhere to those schedules, and that presiding officers will enforce compliance with those schedules. *See Statement of Policy on Conduct of Adjudicatory Proceedings*, CLI-98-12, 48 NRC 18, 21 (1998).

In this instance, although the outcome may seem harsh, we conclude that the Commission's latter directive holds sway. We established the timetable for filing late-filed contentions relating to major Staff issuances so that the parties' obligations would be readily apparent relative to such submissions. We indicated that the Staff should give advance notice of the anticipated public release of documents like the DEIS to permit parties to marshal their resources in anticipation of the need to frame contentions based on those documents. This was intended to permit Intervenor to "hit the ground running" so as to meet the 30-day time limit for submitting late-filed issues. We saw nothing then, and see nothing now, that renders this scheduling deadline unreasonable.

We have made it clear to the parties on more than one occasion that we are fully aware of the resource burdens that the complexity of this proceeding places on everyone (including the Board) and have lauded the efforts of those, including the State, who on a continuing basis have put forth their best efforts to meet the timing and other resource challenges involved. By the same token, we have acted to ensure that in instances when the schedules we have set have not been met for reasons that do not reflect an appropriate concern for those deadlines, parties bore the consequences of that noncompliance. *See* Licensing Board Memorandum and Order (Ruling on Motions to Extend Discovery and to Quash Deposition Notice) (June 14, 1999) at 3-6 (unpublished) (denying request to extend discovery deadline because of party's failure to pursue discovery "until the proverbial 'last minute'"). Unfortunately, the State's showing in this instance is more reflective of the latter approach.

The State's attempt to excuse its noncompliance based on the 1998 vintage of the 30-day filing requirement does not account for that fact that we reiterated the existence of that requirement and emphasized the importance we placed upon it less than 4 months before the Staff released the DEIS. *See* LBP-00-7, 51 NRC at 143 n.1. Further, while we are fully aware of the burdens imposed by the June 2000 evidentiary hearing and the State's post-hearing responsibilities, we do not find particularly compelling the State's explanation regarding Dr. Resnikoff's ability to participate in contention preparation, given he was not involved in that hearing. And certainly none of the explanations provided by the State justifies its failure to seek an extension of the Board's filing directive, as opposed to filing the contentions without apparent regard for that scheduling deadline.² As a consequence, in these circumstances we find that the State has failed to meet its burden to establish good cause for its late-filing, meaning that this factor weighs against admission of its contentions in the section 2.714(a)(1) balancing process. Moreover, in this context, we find the delay, although only 6 days, does not mitigate the significance this factor is to be accorded given the State's failure to seek an extension prior to the expiration of the Board-directed filing deadline.

Thus, lacking good cause as to all the contentions, the State must make a compelling showing relative to the other four factors. With respect to factor two — availability of other means to protect the petitioner's interest — although PFS and the Staff are correct in their assertion that the ability to comment on the DEIS is not a trivial opportunity for involvement in the licensing process, ultimately we agree with the State that, in this instance involving an application to construct and operate an offsite ISFSI, it is not on the same plane as the participation rights that accrue in the adjudicatory context. *See Washington Public Power Supply System* (WPPSS Nuclear Project No. 3), ALAB-747, 18 NRC 1167, 1176-77 (1983) (ability to seek Staff 10 C.F.R. § 2.206 enforcement action relief not equivalent of adjudicatory participation in reactor operating license proceeding). As such, this factor provides some measure of support for admission of the State's late-filed issues. So too does factor four — extent of representation of petitioner's interest by other parties — as both PFS and the Staff recognize. As we noted, however, these two are given less weight in the balance than factors three and five.

In connection with factor three — assistance in developing a strong record — we observe that although Dr. Resnikoff has been involved in this proceeding as a State witness, in and of itself this does not establish that he will contribute to the development of a sound record on these late-filed issues. *See Duke Power Co.* (Catawba Nuclear Station, Units 1 and 2), ALAB-813, 22 NRC 59, 85 (1985). Rather, the focus is on what specific information is provided by an intervenor relative to the contentions at issue that allows the Board fairly to conclude that the

² Whether, and to what degree, the State's explanations might have provided a successful basis for extending the filing deadline is a matter we need not decide since the State chose not to seek that procedural relief.

party will contribute to the development of a sound record on those issues. And in this regard, as we have noted on several other occasions in this proceeding, the Commission has made it clear that a late-filed contention's proponent should, with as much particularity as possible, "identify its prospective witnesses, and summarize their proposed testimony." *Commonwealth Edison Co.* (Braidwood Nuclear Power Station, Units 1 and 2), CLI-86-8, 23 NRC 241, 246 (1986) (quoting *Mississippi Power & Light Co.* (Grand Gulf Nuclear Station, Units 1 and 2), ALAB-704, 16 NRC 1725, 1730 (1982)). In this instance, the State has identified its witness — Dr. Resnikoff — and given us some clue to his testimony, albeit in the form of the narrative for the contentions and their bases. This places factor three on the admissibility side of the balance, with a moderate impact in favor of accepting the contentions.

Finally, relative to factor five — broadening the issues/delaying the proceeding — we find this factor essentially neutral in this instance. To be sure, admission of these late-filed contentions issues will broaden this proceeding by adding additional matters to be litigated. And, based on our June 2000 experience, this could add 3 to 5 days of hearing time that might impact on the overall schedule, albeit to a minor degree. Accordingly, although this factor goes on the admissibility side of the balance, it does so only to a slight degree.

Given this analysis, when the balance of the five factors is finally struck, although factors two through five provide some degree of support for admission of the contentions, we do not consider the overall balance to be "compelling" so as to outweigh the lack of good cause under factor one. This being the case, we deny admission to the State's four late-filed contentions concerning DEIS-related transportation issues.³

III. CONCLUSION

Having failed to establish good cause for (1) not raising its claims about consideration of economic consequences relative to late-filed contentions Utah NN and Utah OO in connection with its challenges to the 1997 PFS ER; and (2) its failure to file late-filed contentions Utah LL through Utah OO within the time frame previously specified by the Board, for which it sought no extension,

³Our ruling on the late-filing criteria means we need not reach the matter of these contentions' admissibility under the section 2.714(b), (d) criteria. We note, however, that we would have admitted contention Utah MM, subpart three. We would have denied the admission of late-filed contention Utah LL and contention Utah MM, subparts one and two, as failing to show that a genuine dispute exists with PFS on a material issue of fact or law and contentions Utah NN and Utah OO as lacking an adequate basis.

Also, we note that our ruling here makes it unnecessary that we resolve either the State's September 7, 2000 motion to amend contention Utah LL, the granting of which would not have affected any determination we might have made denying admission of that late-filed issue, as well as the pending State and Staff motions to strike relative to their pleadings relating to the State's September 7 motion to amend contention Utah LL.

the first and most important element of the 10 C.F.R. § 2.714(a)(1) five-factor test for admitting late-filed contentions balances against admission of these four contentions. None of the other four factors weighs against admission of the contentions; nonetheless, they do not provide the requisite compelling showing that is necessary to overcome the lack of good cause under factor one. Accordingly, the State's request for admission of late-filed contentions Utah LL through Utah OO must be rejected.

For the foregoing reasons, it is, this thirtieth day of October 2000, ORDERED that the State's August 2, 2000 request for admission of late-filed contentions Utah LL, Utah MM, Utah NN, and Utah OO relating to the spent fuel transportation risk analysis in the June 2000 DEIS for the proposed PFS Skull Valley, Utah ISFSI is *denied*.

THE ATOMIC SAFETY AND
LICENSING BOARD⁴

G. Paul Bollwerk, III
ADMINISTRATIVE JUDGE

Dr. Jerry R. Kline
ADMINISTRATIVE JUDGE

Dr. Peter S. Lam
ADMINISTRATIVE JUDGE

Rockville, Maryland
October 30, 2000

⁴Copies of this Memorandum and Order were sent this date by Internet e-mail transmission to counsel for (1) Applicant PFS; (2) Intervenors Skull Valley Band of Goshute Indians, Ohngo Gaudadeh Devia, Confederated Tribes of the Goshute Reservation, Southern Utah Wilderness Alliance, and the State; and (3) the Staff.

UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

ATOMIC SAFETY AND LICENSING BOARD

Before Administrative Judges:

Alan S. Rosenthal, Presiding Officer
Dr. Richard F. Cole, Special Assistant

In the Matter of

Docket No. 40-9027-MLA
(ASLBP No. 99-757-01-MLA)

CABOT PERFORMANCE MATERIALS
(Reading, Pennsylvania)

October 31, 2000

MEMORANDUM AND ORDER
(Granting Motion to Withdraw Hearing Request
and Terminating Proceeding)

Before me is the October 26, 2000 joint motion of the City of Reading, Pennsylvania, and the Redevelopment Authority of that City (Petitioners) for leave to withdraw without prejudice their joint request for a hearing on the application of Cabot Performance Materials (Licensee) for an amendment to a source material license held by it. That license authorizes the possession of contaminated material (uranium and thorium) on two sites in the Commonwealth of Pennsylvania, one of those sites being located in the City of Reading. The proposed amendment would allow the decommissioning of the Reading site in accordance with a plan that the Licensee has submitted to the Commission's Staff for its consideration.

The withdrawal motion recites that Petitioners and the Licensee have settled the matters in dispute between them with respect to the submitted site decommissioning plan. It further recites that, should they later consider there to have been a material breach of the obligations assumed by the Licensee under the settlement agreement, Petitioners might elect to file a new hearing request

with the Commission. Under the terms of the agreement, the Licensee would not be free to contest the new request as being untimely but could raise other legal objections to its acceptance, such as lack of standing or the failure to have provided a sufficient identification of areas of concern as required by the Commission's Rules of Practice.

While plainly the Petitioners have an absolute right to withdraw their hearing request, upon its examination of the motion the NRC Staff apparently had some uncertainty with regard to whether such a withdrawal without prejudice would have the effect of leaving the proceeding open. On October 27, upon being advised of that uncertainty and at the request of the parties, I conducted a telephone conference to address the matter. The participants in the conference included counsel for the Petitioners, the Licensee, and the NRC Staff.

At the conclusion of the conference, there was agreement among all participants that, notwithstanding that it was without prejudice to the possible submission of a new hearing request, the withdrawal of the Petitioners' current request would have the necessary effect of terminating the proceeding at hand. (On May 16, 2000, in LBP-00-13, 51 NRC 284, the separate hearing request filed by Jobert, Inc., and Metals Trucking, Inc., had been dismissed for lack of standing, leaving these Petitioners' request as the only one still under active consideration.) It was further understood by counsel for the Petitioners that any new hearing request would have to meet all existing requirements imposed by the Commission's Rules of Practice and that the commitment of the Licensee not to object to the request on timeliness grounds would not prevent either the NRC Staff from raising such an issue or the Presiding Officer from passing judgment on it independently.

On the basis of that clarification, NRC Staff counsel stated that she had no objection to the motion. Accordingly, it is hereby *granted*. The Petitioners' joint hearing request is considered withdrawn without prejudice and the proceeding is *terminated*.

It is so ORDERED.

BY THE PRESIDING OFFICER*

Alan S. Rosenthal
ADMINISTRATIVE JUDGE

Rockville, Maryland
October 31, 2000

*Copies of this Memorandum and Order were sent this date by Internet e-mail transmission to counsel for the Licensee, Petitioners, and the NRC Staff.

UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

OFFICE OF NUCLEAR REACTOR REGULATION

Samuel J. Collins, Director

In the Matter of

Docket No. 50-247
(License No. DPR-26)CONSOLIDATED EDISON COMPANY
OF NEW YORK, INC.
(Indian Point, Unit 2)

October 6, 2000

Petitioners requested that the NRC issue an Order to ConEd Company of New York preventing the restart of Indian Point Unit 2 (IP2) until the following conditions are satisfied: (1) all four steam generators (SGs) are replaced, (2) the SG tube integrity concerns identified in Dr. Joram Hopenfeld's differing professional opinion (DPO) and in Generic Safety Issue 163 (GSI-163) are resolved, (3) potassium iodide (KI) tablets are distributed to residents and businesses within the 10-mile emergency planning zone or stockpiled in the vicinity of the IP2 facility, (4) concerns as to the adequacy of emergency preparedness at the IP2 site are addressed, and (5) the requirement to conduct biennial emergency plan exercises is satisfied. The Petitioners also requested that a public meeting be held in the vicinity of the IP2 facility as soon as possible.

The Director of the Office of Nuclear Reactor Regulation issued a Director's Decision on October 6, 2000. The decision partially granted the Petitioner's request. The request that the Licensee be ordered to replace the existing steam generators prior to IP2 resuming operation is granted, in that the Licensee has committed to this action and completing it prior to restart. Although the other two issues concerning distribution or stockpiling of KI and the requirement to conduct biennial exercises have merit, the Director's Decision concluded that the action requested was not necessary to ensure the Licensee adhered to the requirements of its license.

DIRECTOR'S DECISION UNDER 10 C.F.R. § 2.206

I. INTRODUCTION

By letter dated March 14, 2000, Mr. David A. Lochbaum, on behalf of the Union of Concerned Scientists, the Nuclear Information & Resource Service, the PACE Law School Energy Project, and Public Citizen's Critical Mass Energy Project (Petitioners), pursuant to Section 2.206 of Title 10 of the *Code of Federal Regulations* (10 C.F.R. § 2.206), requested that the U.S. Nuclear Regulatory Commission (Commission or NRC) take action with regard to the Indian Point Nuclear Generating Unit No. 2 (IP2), owned and operated by the Consolidated Edison Company of New York, Inc. (Con Ed). The Petitioners requested that the NRC issue an order to the Licensee preventing the restart of IP2, or modifying the license for IP2 to limit it to zero power, until (1) all four steam generators are replaced, (2) the steam generator tube integrity concerns identified in Dr. Joram Hopenfeld's differing professional opinion (DPO) and in Generic Safety Issue 163 (GSI-163) are resolved, and (3) potassium iodide tablets are distributed to residents and businesses within the 10-mile emergency planning zone (EPZ) or stockpiled in the vicinity of IP2. (The DPO process provides for the review of concerns raised by individual NRC employees who disagree with a position adopted by the NRC Staff).

II. BACKGROUND

As a basis for the requests described above, the Petitioners stated that adequate protection of public health and safety dictated that the issues in their petition be fully resolved before IP2 resumed operation. Additionally, the Petitioners requested that a public hearing on this petition be conducted in the vicinity of the plant before its restart is authorized by the NRC.

The Commission informed the Petitioners in a letter dated April 5, 2000, that the Staff had determined that the Petitioners' request that the NRC issue an order to prevent Con Ed from restarting IP2, or modify the license for IP2 to limit it to zero power, until the concerns raised in Dr. Hopenfeld's DPO and GSI-163 are resolved and until potassium iodide tablets are distributed to people and businesses within the 10-mile EPZ or stockpiled in the vicinity of IP2, does not meet the criteria set forth in NRC Management Directive 8.11, Part II, for review under 10 C.F.R. § 2.206. Based on additional information provided by the Petitioners at a public meeting held at NRC Headquarters on April 7, 2000, and information contained in a letter from the Petitioners dated April 12, 2000, the Staff re-evaluated the potassium iodide issue and determined that it met the criteria for review under section 2.206. However, the information provided by

the Petitioners in an April 14, 2000 supplement to their petition did not provide information uniquely applicable to IP2 and, therefore, the concerns raised in Dr. Hopenfeld's DPO and GSI-163 were not reviewed under section 2.206. Both of these determinations were provided to the Petitioners in a letter dated June 26, 2000.

In letters dated June 12, June 29, and July 13, 2000, the Petitioners further supplemented the petition. In the June 29, 2000 letter, the Petitioners stated that 10 C.F.R. Part 50, Appendix E, requires each licensee at each site to conduct a full-participation biennial exercise. Because the two nuclear units at the Indian Point site are operated by different licensees, the Petitioners stated that the regulations would require each Licensee to conduct a full-participation exercise every 2 years. The Petitioners requested that the NRC not permit the restart of IP2 until the successful completion of such an exercise. By letter dated August 31, 2000, this issue was accepted for review under section 2.206.

In the June 12, 2000 supplement, it was requested that IP2 not be allowed to restart until concerns related to IP2 emergency preparedness, identified in an internal Federal Emergency Management Agency (FEMA) memorandum dated May 12, 2000, were addressed. In the July 13, 2000 supplement, the Petitioners requested reinstatement for review under section 2.206 of their request that Dr. Hopenfeld's DPO be resolved prior to allowing IP2 to restart. In the August 31, 2000 letter, the Petitioners were informed that neither of these issues met the criteria for review under section 2.206, and were provided the basis for that determination, as discussed below. The criteria for the review of Petitions is contained in Part II of NRC Management Directive 8.11, which can be found at the NRC's website, <http://www.nrc.gov/NRC/PUBLIC/2206/index.html>.

III. DISCUSSION

Issue 1: Issue an Order To Prevent Restart of IP2 Until All Four Steam Generators Are Replaced

As the basis for the request that the NRC prevent the Licensee from restarting IP2 until all four steam generators are replaced, the Petitioners state that IP2 is equipped with Westinghouse Model 44 steam generators and that all other operating power plants in the United States that were originally equipped with Westinghouse Model 44 steam generators have replaced them. The Petitioners also state that the IP2 steam generators have had an average of 10% of their tubes removed from service and that many other tubes have crack indications.

Response

Following a steam generator tube failure on February 15, 2000, the Licensee's inspection of the steam generator tubes found that greater than 1% of the inspected tubes in the IP2 steam generators contained indications of defects. Unlike most plant's technical specifications (TS), the IP2 TSs require NRC approval prior to restart of the plant for steam generators experiencing this percentage of defective tubes. By letter dated June 2, 2000, as supplemented on July 7 and July 27, 2000, ConEd submitted for NRC review an operational assessment of its steam generators in support of the proposed restart of the plant. Prior to completion of the Staff review, the Licensee informed the NRC that it had decided to replace the IP2 steam generators during the current outage. Therefore, the NRC Staff ceased its review of the Licensee's operational assessment. Because the intent of the Petitioners' request has been satisfied, i.e., the steam generators will be replaced prior to plant startup from the current outage, no further action on this request was determined to be necessary, and the request is, in essence, granted.

Issue 2: Issue an Order To Prevent Restart of IP2 Until Potassium Iodide Tablets Are Distributed to Residents and Businesses Within the 10-Mile Emergency Planning Zone (EPZ) or Are Stockpiled in the Vicinity of IP2

As the basis for the request that the NRC prevent the Licensee from restarting IP2 until potassium iodide (KI) tablets have been distributed to people and businesses within the 10-mile EPZ, the Petitioners state that the incident at IP2 demonstrated the potential for a more serious accident. The Petitioners state that KI has long been recognized for reducing the harm experienced by humans from airborne radioactivity and that by distributing KI tablets to people in the vicinity of the plant along with directions on when to administer the tablets, the health consequences of an accident can be reduced. Alternatively, the Petitioners state, sufficient KI tablets for the people around the facility could be stockpiled in the communities for rapid distribution following an accident. In their supplement dated April 12, 2000, the Petitioners cited the high population density in the vicinity of IP2 as a unique circumstance that justifies this action.

Response

The requirements for emergency planning for commercial nuclear power plants are established in the NRC's emergency planning regulations (10 C.F.R. §§ 50.47, 50.54, and Appendix E to Part 50). Criteria for meeting the emergency planning regulations for licensees and state and local governments are given in the joint NRC-FEMA document NUREG-0654/FEMA-REP 1, Rev. 1, issued

in November 1980. As indicated in this document, the objective of emergency planning is to produce dose reductions for a wide spectrum of accidents that could potentially lead to offsite doses in excess of the U.S. Environmental Protection Agency's protective action guidelines (PAGs), including design-basis events such as steam generator tube ruptures, and severe, beyond-design-basis, reactor accidents. Thus, the steam generator accidents postulated by the Petitioners are within the spectrum of accidents considered in the development of the planning basis for emergency preparedness at IP2.

The regulations, in 10 C.F.R. § 50.47(b)(10), require that emergency plans for nuclear power plants include a "range of protective actions" for the plume exposure pathway EPZ for emergency workers and the public. NUREG-0654 recognizes that KI may be one of the protective actions considered in the development of the onsite and offsite emergency plans. KI, if administered before or within a few hours of exposure to inhaled radioiodines, can reduce the radiological dose to the thyroid. Doses to the whole body and internal organs from other radionuclides associated with reactor accidents, such as noble gases and cesium, are not affected by the administration of KI. Thus, NRC and FEMA emergency planning guidance emphasizes evacuation, sheltering, and the interdiction of contaminated foodstuffs as the principal protective actions for the public.

The current federal guidance to state and local governments on the distribution of KI was issued in July 1985 (50 Fed. Reg. 30,258) by FEMA in its role as Chair of the Federal Radiological Preparedness Coordinating Committee (FRPCC). The 1985 federal policy recommends providing KI to emergency workers and institutionalized persons, but does not recommend stockpiling or predistribution of KI for the public. The federal policy recognizes, however, that the responsibility for decisions on the distribution and use of KI for the public resides with the state and, in some cases, local health authorities. The federal policy lists a number of factors that state and local authorities should consider in deciding whether to distribute and use KI for the general population, and indicates that the decision on whether KI should be stockpiled and distributed to the general public around a particular site depends on local conditions.

The Licensee's onsite emergency plan contains provisions for the distribution of KI to emergency workers. New York State and the local governments within the IP2 EPZ make KI available for emergency workers and institutionalized persons in facilities where evacuation is not possible or feasible, but have elected not to distribute or stockpile KI for the general public consistent with the current federal KI policy. NRC and FEMA have concluded that the onsite and offsite emergency plans for IP2, including the provisions for KI, provide reasonable assurance that appropriate protective measures can be taken to protect the health and safety of the public in the event of a radiological emergency at the site.

The NRC conducted a special proceeding in 1982-1984 to determine the extent to which the population around the Indian Point site affected the risk posed by an accident at the site, as compared to the spectrum of risks posed by other nuclear power plants. Among the issues considered was the need for predistribution of KI to the public. In the Commission decision (CLI-85-6, 21 NRC 1043, 1086 (1985)), the Commission concluded that operation of the Indian Point Units 2 and 3 did not impose a risk to the public significantly greater than that imposed by other NRC-licensed plants. Regarding KI, the Commission agreed with the conclusion of the Atomic Safety and Licensing Board that presided over the special proceeding (LPB-83-68, 18 NRC 811, 1008 (1983)) on the lack of any need for predistribution of KI to the public. The Petitioners did not provide any information, nor are we aware of any new information, that would invalidate this conclusion.

The NRC is currently working with FEMA, the U.S. Food and Drug Administration, and other federal agencies in reviewing the 1985 federal KI policy. The NRC is also in the process of developing a proposed amendment to its emergency planning regulations that would require that consideration be given to including KI as a protective measure for the general public as a supplement to evacuation and/or sheltering. The Commission published a proposed rule in the *Federal Register* (64 Fed. Reg. 31,737) on June 14, 1999, for a 90-day comment period. The proposed amendment, however, would not require that KI be made available for the general public; that decision would still be made by state and local governments. The Commission is currently considering the final rule on the consideration of KI in radiological emergency plans for nuclear power plants. In this connection, the NRC is also developing a guidance document to assist state and local decision makers in their consideration of the role and use of KI for the general public in their site-specific emergency plans.

Since both NRC and FEMA have concluded that the onsite and offsite emergency plans for IP2 provide reasonable assurance that appropriate protective measures can be taken to protect the health and safety of the public in the event of a radiological emergency at the site, there is no basis to require the distribution or stockpiling of KI in the vicinity of IP2. Therefore, this request is denied.

Issue 3: The NRC Should Not Allow Restart of IP2 Until After a Full-Participation Emergency Exercise Has Been Successfully Completed

As a basis for this request, the Petitioners state that 10 C.F.R. Part 50, Appendix E requires each licensee at each site to conduct a full-participation biennial exercise. Because the two nuclear units at the Indian Point site are operated by different Licensees, each Licensee must conduct a full-participation exercise every 2 years.

Response

Clearly the IP2 full-participation plume exposure pathway exercise conducted on June 24, 1998, met the biennial requirement for both onsite and offsite participation. The Staff notes that since the offsite authorities that have a role under IP2's emergency plan also have roles under the emergency plans for other licensees (IP3 for State and local authorities; Nine Mile Point, FitzPatrick, and Ginna for State authorities), a partial participation exercise can also meet the biennial requirement in accordance with paragraph IV.F.2.c of 10 C.F.R. Part 50 Appendix E.

Licensees and offsite authorities are faced with a difficult task to coordinate and schedule an exercise that involves multiple governmental agencies at the federal, state, and local level. Many response organizations depend on volunteers. In order to accommodate this difficult task, IE Information Notice No. 85-55, "Revised Emergency Exercise Frequency Rule," dated July 15, 1985, as well as FEMA-REP-14, "Radiological Emergency Preparedness Exercise Manual," dated September 1991, allow exercises to be scheduled at any time during the calendar biennium. Therefore, the Licensee will remain in compliance with the biennial requirement until December 31, 2000. As noted previously, the Licensee informed the NRC that it had decided to voluntarily replace the IP2 steam generators during the current outage and would plan to restart in fall 2000. Since the Licensee plans to restart before December 31, 2000, an emergency preparedness exercise is not required prior to restart of IP2. Therefore, this request is denied.

The Petitioners did point out an ambiguity in the emergency preparedness regulations and the application of these regulations regarding co-located licensees on a site. The Staff is evaluating whether a clarification to the regulations is warranted.

IV. CONCLUSION

For the reasons discussed above, the NRC Staff concludes that, in essence, the request that the Licensee be ordered to replace the existing steam generators prior to IP2 resuming operation is granted, in that the Licensee has committed to this action. Although the other two issues concerning distribution or stockpiling of KI and the requirement to conduct biennial exercises have merit, the action requested was not necessary to ensure that the Licensee adhered to requirements of its license. However, the NRC Staff concluded that a public meeting with the Petitioners to discuss the issues raised in the petition and to provide an opportunity to provide additional information in support of their request was warranted. This meeting was held on April 7, 2000, at the NRC Headquarters offices. The Staff's efforts regarding this petition are complete.

A copy of the Decision will be filed with the Secretary of the Commission for the Commission's review in accordance with 10 C.F.R. § 2.206(c). As provided for by that regulation, the Decision will constitute the action of the Commission 25 days after the date of issuance of the Decision unless the Commission, on its own motion, institutes a review of the Decision within that time.

FOR THE NUCLEAR
REGULATORY COMMISSION

Samuel J. Collins, Director
Office of Nuclear Reactor Regulation

Dated at Rockville, Maryland,
this 6th day of October 2000.

UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

OFFICE OF NUCLEAR REACTOR REGULATION

Samuel J. Collins, Director

In the Matter of

Docket Nos. 50-321
50-366
(License Nos. DPR-57,
NPF-5)

SOUTHERN NUCLEAR OPERATING
COMPANY

(Edwin I. Hatch Nuclear Plant,
Units 1 and 2)

October 18, 2000

The Petitioner under the 10 C.F.R. § 2.206 process requested that NRC (1) ask questions of the Licensee via a demand for information related to liquid and gaseous radwaste systems at Hatch, (2) issue generic communications concerning aging of liquid and gaseous radwaste systems, and (3) revise 10 C.F.R. Parts 51 and 54 to include aging management for liquid and gaseous radwaste systems.

The Director of the Office of Nuclear Reactor Regulation issued a Director's Decision on October 18, 2000, and denied the Petitioner's requests. The NRC Staff does not agree with the Petitioner's contentions that Hatch is being operated outside its design and licensing bases because the material condition of piping, tanks, and other components of the liquid and gaseous radwaste systems is not being properly inspected and maintained.

DIRECTOR'S DECISION UNDER 10 C.F.R. § 2.206

I. INTRODUCTION

By letter dated May 3, 2000, Mr. David A. Lochbaum, on behalf of the Union of Concerned Scientists (Petitioner), pursuant to section 2.206 of Title 10 of the

Code of Federal Regulations (10 C.F.R. § 2.206), requested that the U.S. Nuclear Regulatory Commission (Commission or NRC) take action with respect to Edwin I. Hatch Nuclear Plant, Units 1 and 2 (Hatch). Hatch is owned and operated by the Southern Nuclear Operating Company (the Licensee). The Petitioner requested that the NRC ask questions of the Licensee via a demand for information, related to the liquid and gaseous radwaste systems at Hatch.

II. BACKGROUND

The Petitioner contended that Hatch is being operated outside its design and licensing bases because the material condition of the piping, tanks, and other components of the liquid and gaseous radwaste systems is not being properly inspected and maintained. The NRC, by letter of June 27, 2000, asked for the information from the Licensee, which partially satisfied the action requested by the Petitioner. The Licensee responded in its letter of July 26, 2000. The NRC Staff has reviewed the Licensee's response and concluded that the information provided by the Licensee is responsive to your contentions.

III. DISCUSSION

Contention No. 1

The Hatch Nuclear Plant is being operated outside its design and licensing bases because the material condition of piping, tanks, and other components of the liquid radwaste system [is] not being properly inspected and maintained.

The Petitioner cited General Design Criterion (GDC) 60 and GDC 4 as the design and licensing bases. The Petitioner stated the following three specific concerns as the reason for the Petitioner's assertion that the liquid radwaste system at Hatch does not conform to its licensing and design bases: (1) susceptibility of liquid radwaste system piping to degradation, (2) susceptibility of liquid radwaste system tanks and vessels to degradation, and (3) degraded capability of valves that isolate liquid radwaste discharge. The Petitioner asserts that the liquid radwaste system is vulnerable to degradation mechanisms, such as flow-accelerated corrosion and microbiologically induced corrosion, but the liquid radwaste system piping is not covered by aging management programs. These aging management programs include the flow-accelerated corrosion program, the treated-water systems piping inspection program, and the evaluation program for buried or embedded piping. The Petitioner asserted, therefore, that it is reasonable to expect that the liquid radwaste system is degraded to an unknown extent and that it appears that Hatch is not in compliance with the licensing requirements.

Response

The liquid radwaste system is not needed to mitigate the effects of accidents and therefore is not considered safety related. The Staff agrees with the Petitioner on the applicability of GDC 60 as a design and licensing basis, but GDC 4 does not apply. Standard Review Plan (SRP) 11.2, "Liquid Waste Management Systems," discusses the regulations that apply to the liquid radwaste system. GDC 60 is included as one of the regulatory requirements because the nuclear power plant needs to be designed to control the release of radioactive materials in liquid and gaseous effluents during normal reactor operation, including anticipated operational occurrences. The Staff has reviewed section 9.2 of the Hatch Unit 1 Final Safety Analysis Report (FSAR) and section 11.2.1 of the Hatch Unit 2 FSAR and confirmed that GDC 4 is not a design or licensing basis for the liquid radwaste system.

In support of the contention that the liquid radwaste system at Hatch is being operated outside of its design and licensing bases, the Petitioner cites an installation deficiency in the liquid radwaste system at Hatch, evidence of degradation in other systems at Hatch, and evidence of degradation in the liquid radwaste system at Millstone.

The Petitioner cites an installation deficiency in the Hatch Unit 1 liquid radwaste system which was reported in the Notice of Reportable Occurrence No. 50-321/1979-43, dated June 29, 1979. Subsequent to this notice, Licensee Event Report (LER) 79-43 was submitted on August 17, 1979, to address the installation deficiency. The LER included corrective action taken and stated that "the piping supports were redesigned and installed to meet seismic Class I requirements."

The Petitioner cites degradation problems with other systems at Hatch, such as plant service water and residual heat removal service water. The Petitioner states that the liquid radwaste system is as vulnerable as these other systems to certain degradation mechanisms. The Petitioner also cites three examples, in systems other than the radwaste systems, of the detrimental effects of valve aging at Hatch. The Licensee, in its July 26, 2000 response stated that the conditions such as pressure, volume, and quality of the fluid in the liquid radwaste system are different than the conditions in other systems. Thus, the Licensee concludes that the radwaste system is not as susceptible to many of the aging mechanisms that could affect other systems at Hatch.

The Petitioner cites NRC Information Notices (IN) 79-07 and 96-14 as examples of degradation that actually occurred at U.S. nuclear power plants; both involved the Millstone Nuclear Power Station. IN 79-07 stated that "such events can be avoided by proper procedures and periodic examination if personnel are aware of the problem." IN 96-14 stated that "a lack of continuing and preventive maintenance appeared to have allowed several systems and components to significantly degrade." The Licensee, in its July 26, 2000 response stated

that Hatch operations personnel perform daily rounds during which systems are observed for proper performance and material condition (major portions of the radwaste systems at Hatch are accessible for observation).

NRC resident inspectors, during their inspection rounds, regularly tour the plant, including the radwaste systems. In addition, NRC inspectors specializing in radiation protection periodically inspect portions of the liquid radwaste system. Recent inspections of this nature have not identified any significant problems.’’ For example, as discussed in Inspection Report Nos. 50-321/99-08 and 50-366/99-08, dated January 20, 2000, NRC inspectors reviewed the performance of several radiation monitors and the quantification of selected liquid samples, and found no problem. The Inspection Report stated that the radiation doses resulting from liquid effluent releases were a small percentage of regulatory limits.

If a degraded condition is identified by the Licensee, or is reported to the Licensee by the NRC, the Licensee should generate a condition report and the condition should be evaluated and repaired as required in accordance with the plant’s corrective action program. In addition, these condition reports are trended by the Licensee. Further evaluation and appropriate corrective actions would be taken if an adverse trend was identified. Periodic inspections of the corrective action program are conducted according to the NRC inspection program to verify that licensees are identifying and correcting plant problems. For example, ‘‘NRC Integrated Inspection Report Nos. 50-321/99-11, 50-366/99-11, and 76-36/00-01,’’ dated March 6, 2000, stated that inspectors reviewed the Hatch Condition Reporting System procedure, which describes the Licensee’s program for identifying and correcting deficiencies. The Inspection Report concluded that the Licensee had satisfactorily identified and corrected deficiencies.

The Petitioner raised a concern related to the consequences of failures in the liquid radwaste system. The consequences of a potential simultaneous failure of all liquid radwaste tanks have been analyzed and reviewed by the Staff in the ‘‘Safety Evaluation of the Edwin I. Hatch Nuclear Plant Unit 1,’’ dated May 11, 1973. The analyses showed that the resulting releases would be a small fraction of 10 C.F.R. Part 20 release limits. In the ‘‘Safety Evaluation Report Related to Operation of Edwin I. Hatch Nuclear Plant, Unit 2,’’ (Unit 2 SER) dated June 1978, the NRC Staff ‘‘determined that the estimated releases due to postulated failure of components of the liquid radwaste system will not result in concentrations in the unrestricted area in excess of the limits set forth in Table II of Appendix B to 10 C.F.R. Part 20.’’ In addition, Hatch has a Radiological Environmental Monitoring Program in place, as required by 10 C.F.R. Part 50, Appendix I. This surveillance and monitoring program applies to various pathways through which radioactive material might be released to the air, river water, milk, and vegetation and entails taking periodic samples and conducting analyses of these samples. Any detected concentrations of radioactive material above predetermined limits are required to be reported. Also, the Georgia Department of Natural Resources monitors

groundwater in the vicinity around the plant. Neither program has identified concentrations of radioactive material above or near permitted limits.

The Petitioner asserts that a break in a liquid radwaste pipe inside one of the plant's buildings could result in significant exposure to the plant workers. The Licensee is required by regulation (10 C.F.R. Part 20) to have and maintain a radiation protection program to ensure that radiation exposure of plant workers is not only controlled below limits, but to go further and have a program to keep doses as low as reasonably achievable (ALARA). As part of this program, plant workers wear digital alarming dosimeters when entering plant areas containing liquid radwaste system piping. Furthermore, radiation monitors are located in these areas. Therefore, the NRC Staff concludes that there is reasonable assurance the plant workers will not receive a significant exposure in the event of a break in a liquid radwaste pipe inside one of the plant's buildings.

The liquid radwaste system is operated on a regular basis to control effluents, and any significant degradation of the material condition of the system would be quickly detected. Thus, operability of the system is demonstrated without the need for special inspections or testing. However, the Licensee does perform quarterly testing on the discharge valves that close to terminate the release of radioactive water to the river.

The liquid radwaste system is designed and licensed to limit the doses from effluents to individual members of the public to levels as low as reasonably achievable (ALARA) to comply with Appendix I to 10 C.F.R. Part 50. Based on the discussion above, the NRC believes that the liquid radwaste system is being operated within its design and licensing bases.

Contention No. 2

The Hatch Nuclear Plant is being operated outside its design and licensing bases because the material condition of piping and components of the gaseous radwaste system [is] not being properly inspected and maintained.

The Petitioner cited GDC 60 and GDC 4 as the design and licensing bases. The Petitioner stated the following two specific concerns as the reason for the Petitioner's assertion that the gaseous radwaste system at Hatch does not conform to its licensing and design bases: (1) susceptibility of gaseous radwaste system piping to degradation and (2) degraded capability of the gaseous radwaste system to preclude hydrogen burns and detonations. The Petitioner asserted that the offgas systems at Hatch are vulnerable to aging degradation but are not covered by aging management programs.

Response

The gaseous radwaste system is not needed to mitigate the effects of accidents and therefore is not considered safety related. The Staff agrees with the Petitioner on the applicability of GDC 60 as a design and licensing basis, but GDC 4 does not apply. SRP 11.3, "Gaseous Waste Management Systems," discusses the regulations that apply to the gaseous radwaste system. GDC 60 is included as one of the regulatory requirements because the nuclear power plant needs to be designed to control the release of radioactive materials in liquid and gaseous effluents during normal reactor operation, including anticipated operational occurrences. The Staff has reviewed section 9.4 of the Hatch Unit 1 FSAR and section 11.3.1 of the Hatch Unit 2 FSAR and confirmed that GDC 4 is not a design or licensing basis for the gaseous radwaste system.

The Petitioner raises concerns that the piping and other components of the offgas system may be degraded to an unknown extent. Evidence of degradation is monitored by operations personnel through daily rounds during which systems are observed for proper performance and material condition. NRC resident inspectors, during their inspection rounds, regularly tour the plant, including the radwaste systems. In addition, NRC inspectors specializing in radiation protection periodically inspect portions of the gaseous radwaste system. Recent inspections of this nature have not identified any significant problems. If a degraded condition is identified by the Licensee or reported to the Licensee by NRC inspectors, the Licensee should generate a condition report and the condition should be evaluated and repaired as required in accordance with the plant's corrective action program. Periodic inspections of the corrective action program are conducted according to the NRC inspection program to verify that licensees are identifying and correcting plant problems.

The Petitioner raised concerns regarding a break in the offgas system piping running to the main stack. In Section 9.4.6.1 of the Unit 1 FSAR and Section 15.4.15.1.4.1 of the Unit 2 FSAR, the Licensee has evaluated the consequences of a potential complete rupture of this piping and concluded that the resulting calculated doses at the plant site boundary would not exceed the limits for normal plant operation specified in 10 C.F.R. Part 20. The NRC Staff has reviewed the results of the Licensee's analyses and finds that the results satisfy the criteria stated in Branch Technical Position ETSB 11-5 and are therefore acceptable. In addition, Hatch has a Radiological Environmental Monitoring Program in place, as required by 10 C.F.R. Part 50, Appendix I. This surveillance and monitoring program applies to various pathways through which radioactive material might be released to the air, river water, milk, and vegetation. Any detected concentrations of radioactive material above predetermined limits are required to be reported. This program has not identified concentrations of radioactive material above or

near permitted values. Any leakage from the offgas system in the plant building would be detected by plant radiation monitoring instrumentation.

The Petitioner asserts that a break of the offgas piping running to the main stack could cause the radiation exposures to individuals in the power block to increase above negligible. As previously mentioned, the Licensee is required by regulation to have and maintain a radiation protection program to limit radiation exposure of plant workers. As part of this program, workers wear digital alarming dosimeters when entering plant areas in the power block that contain the offgas piping that runs to the main stack. Furthermore, radiation monitors are located in these areas. Therefore, the NRC Staff concludes that there is reasonable assurance that individuals in the power block will not receive significant radiation exposure in the event of a break of the offgas piping that runs to the main stack.

NRC inspectors periodically review portions of the gaseous radwaste system. For example, Inspection Report Nos. 50-321/99-04 and 50-366/99-04, dated August 4, 1999, stated that inspectors observed the filter change out for the Unit 1 and Unit 2 gaseous and particulate effluent monitors and determined that it was done in accordance with Licensee procedures. The Inspection Report also stated that, based on a review of the Licensee's 1998 Annual Effluent Release Report issued prior to May 1, 1999, the amounts of activity released from the plant in liquid and gaseous effluents had remained stable over the last several years and the radiation doses resulting from those releases were a small percentage of regulatory limits.

The Petitioner questions the degraded capability of the gaseous radwaste systems to preclude hydrogen burns and detonations. Hydrogen burns and detonations are prevented by keeping the hydrogen concentration of gases from the air ejector below the flammable limit. This goal is achieved by maintaining adequate process steam flow for dilution at all times. This steam flow is monitored and alarmed in the control room. Hydrogen analyzers are used to monitor the offgas system to provide further assurance that the hydrogen concentration is maintained below the flammable limit. However, in the unlikely event of an uncontrollable hydrogen increase, plant procedures require that the plant be shut down. The offgas system piping and components are designed to withstand the unlikely event of a hydrogen burn or detonation. The NRC Staff stated in the Unit 2 SER that design provisions incorporated to reduce the potential for gaseous releases due to hydrogen explosions in the gaseous radwaste system were acceptable.

The Petitioner states that there have been more than twenty-five hydrogen burns and detonations in offgas systems at plants similar to Hatch. In 1990, Hatch experienced an event involving possible ignition of hydrogen in the Unit 1 offgas system. The event was discussed in LER 321/90-012, dated July 20, 1990. The LER included corrective actions to replace valves and to revise system operating and abnormal occurrence procedures to assure specific actions are taken

if hydrogen concentrations exceed certain limits. The LER also stated that Hatch Unit 2 was not susceptible to the identified cause of the Unit 1 event because of a difference in design of the offgas system. The LER concluded that the health and safety of the public was not affected by the event. The LER was reviewed by NRC inspectors and discussed in an inspection report dated June 23, 1992. The inspection report discusses a number of corrective actions that were taken following the event. These corrective actions included repair or replacement of various components in the offgas system and revisions to procedures that directly affect the operation of the offgas system. The inspection report stated that these procedural revisions properly implemented corrective actions for this event.

The gaseous radwaste system is operated on a regular basis to control effluents, and any significant degradation of the material condition of the system would be quickly detected. Thus, operability of the system is demonstrated without the need for special inspections or testing.

The gaseous radwaste system is designed and licensed to limit the doses from effluents to individual members of the public to ALARA levels to comply with Appendix I to 10 C.F.R. Part 50. Based on the discussion above, the NRC concludes that the gaseous radwaste system is being operated within its design and licensing bases.

IV. CONCLUSION

The NRC requested information from the Licensee, which, in essence, satisfied the action requested by the Petitioner. However, for the reasons discussed above, the NRC Staff does not agree with the Petitioner's contentions that Hatch is being operated outside its design and licensing bases because the material condition of piping, tanks, and other components of the liquid and gaseous radwaste systems is not being properly inspected and maintained.

A copy of this Director's Decision will be filed with the Secretary of the Commission in accordance with 10 C.F.R. § 2.206(c). As provided by that regulation, this Director's Decision will constitute the final action of the Commission 25 days after the date of issuance of this Director's Decision unless

the Commission, on its own motion, institutes a review of this Director's Decision within that time.

FOR THE NUCLEAR
REGULATORY COMMISSION

Samuel J. Collins, Director
Office of Nuclear Reactor Regulation

Dated at Rockville, Maryland,
this 18th day of October 2000.

UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

COMMISSIONERS:

Richard A. Meserve, Chairman
Greta Joy Dicus
Nils J. Diaz
Edward McGaffigan, Jr.
Jeffrey S. Merrifield

In the Matter of

Docket No. 72-22-ISFSI

PRIVATE FUEL STORAGE, L.L.C.
(Independent Spent Fuel Storage
Installation)

November 17, 2000

In this proceeding concerning the application of Private Fuel Storage, L.L.C. (PFS), under 10 C.F.R. Part 72 to construct and operate an independent spent fuel storage installation (ISFSI), the Commission affirms the Licensing Board's rulings denying the late-filed requests of William D. Peterson to intervene in the proceeding.

RULES OF PRACTICE: CONTENTIONS (NEW INFORMATION)

New environmental contentions based on the NRC Staff's draft environmental impact statement (DEIS) are permitted if data or conclusions in the DEIS differ significantly from the Applicant's environmental report. 10 C.F.R. § 2.714(b)(2)(iii).

RULES OF PRACTICE: RECONSIDERATION MOTIONS

MOTION FOR RECONSIDERATION: RAISING MATTERS FOR FIRST TIME

Reconsideration motions afford an opportunity to request correction of a Board error by refining an argument, or by pointing out a factual misapprehension or a

controlling decision of law that was overlooked. New arguments are improper. *See Louisiana Energy Services, L.P.* (Claiborne Enrichment Center), CLI-97-2, 45 NRC 3, 4 (1997).

RULES OF PRACTICE: APPEALS

Licensing Board rulings are affirmed where the brief on appeal points to no error of law or abuse of discretion that might serve as grounds for reversal of a Board's decision. *See International Uranium (USA) Corp.* (White Mesa Uranium Mill), CLI-98-6, 47 NRC 116, 118 (1998); *Yankee Atomic Electric Co.* (Yankee Nuclear Power Station), CLI-98-21, 48 NRC 185, 201 (1998).

MEMORANDUM AND ORDER

This case involves the application of Private Fuel Storage, L.L.C. ("PFS"), for a license to build and operate an independent spent fuel storage installation ("ISFSI") in Utah. On August 31, 2000, the Licensing Board issued an order denying the late-filed intervention petition of William D. Peterson. *See* LBP-00-23, 52 NRC 114 (2000). The Board ruled that (1) a balancing of the five late-filing criteria of 10 C.F.R. § 2.714(a)(1) did not support granting the petition; (2) Mr. Peterson did not establish standing to intervene as a matter of right; and (3) Mr. Peterson did not present a litigable contention. *Id.* On September 15, 2000, Mr. Peterson filed a second petition — this one seeking "Intervention into the EIS." On September 25, 2000, the Board denied the second petition in an unpublished memorandum and order. On October 6, 2000, Mr. Peterson filed an "Appeal to the Commission for Intervener [*sic*] Status." We affirm both Board orders, for the reasons given by the Board and for the reasons we set forth below.

I. BACKGROUND

Nearly 3 years after the deadline for filing timely intervention petitions, Mr. Peterson filed a petition to intervene in this matter (hereinafter "Peterson's First Petition").¹ He identified himself as an applicant for an ISFSI at Pigeon Spur, Utah, and stated that his interests were aligned with those of PFS against Intervenor, the State of Utah. Pursuant to an order of the Board, he later filed twenty-seven numbered contentions dealing primarily with his problems with the State of Utah regarding his proposed Pigeon Spur facility. PFS and the NRC Staff

¹ *See* Petition to Intervene, Third Party Complaint, for Intervener's Use of State Law to Deprive PFS and [Pigeon Spur Storage Facility] of Rights of Storage of [Spent Nuclear Fuel] by Federal Law (June 5, 2000).

responded to Mr. Peterson's filings and asserted that his First Petition should be denied. The State of Utah did not file a response.

The Board denied Peterson's First Petition because he failed to establish (1) that good cause existed for the late filing of his intervention petition or that the other four elements of the late-filing balancing test of 10 C.F.R. § 2.714(a)(1) provided compelling support for the admission of his petition;² (2) that he will suffer an injury that falls within the zone of interests and that can be redressed by this proceeding so as to show he has standing as of right; and (3) that any of the "contentions" set forth are admissible in accordance with the requirements of 10 C.F.R. § 2.714(b), (d). *See* LBP-00-23, *supra*.

Mr. Peterson's explanation for his delay in filing was that the intervention of the State of Utah changed the original proceeding and negatively affected his Pigeon Spur application. The Board found that, whether or not the intervention of the State of Utah is deemed an appropriate trigger for late filing, Mr. Peterson provided no justification for the 2-year delay between granting intervenor status to the State and the filing of his First Petition. The Board applied the other four elements of the balancing test for late intervention and concluded that Mr. Peterson had other means to challenge the State of Utah's policies; that his participation would not help to develop a sound record; that his interests would be adequately represented by PFS; and that his participation would broaden or delay the instant proceeding. *See* 10 C.F.R. § 2.714(a)(1)(ii)-(v). The Board further concluded that Mr. Peterson failed to establish standing because he asserted that the actions of Utah and its governor, not the PFS application for a license, would cause him injury. Similarly, the Board ruled that Mr. Peterson's contentions were inadmissible, primarily because they showed no genuine dispute with PFS.

Peterson subsequently filed a document entitled "Petition for Intervention into the EIS" (Sept. 15, 2000) (hereinafter "Peterson's Second Petition"), which included five new "contentions" and a request for reconsideration of LBP-00-23.³ Both PFS and the NRC Staff responded, requesting denial of the petition. The State of Utah did not respond. On September 25, 2000, the Board issued its unpublished Memorandum and Order, Denying Motion for Reconsideration/Intervention Petition ("Sept. 25 Order"). The Board noted that Peterson's Second Petition could be interpreted either as a motion for

²The five factors are (1) good cause, if any, for failure to file on time; (2) the availability of other means whereby the petitioner's interest will be protected; (3) the extent to which the petitioner's participation may reasonably be expected to assist in developing a sound record; (4) the extent to which the petitioner's interests will be represented by existing parties; and (5) the extent to which the petitioner's participation will broaden the issues or delay the proceeding. *See* 10 C.F.R. § 2.714(a)(1).

³Two of the "contentions" were based on the NRC Staff's draft environmental impact statement ("DEIS") for the proposed ISFSI that is the subject of this proceeding. *See* "Draft Environmental Impact Statement for the Construction and Operation of an Independent Spent Nuclear Fuel Storage Installation on the Reservation of the Skull Valley Band of Goshute Indians," NUREG-1714 (June 2000). The DEIS did not consider the Pigeon Spur site as an alternative. The other three contentions relate to Mr. Peterson's general complaints against the State of Utah and to statements of Utah officials and others regarding storage of spent nuclear fuel.

reconsideration of the Board's August 31, 2000 decision or as a new petition to intervene. Under either interpretation, the Board rejected the pleading.

Initially, treating Peterson's Second Petition as a Motion for Reconsideration, the Board found that it failed for two reasons. First, the Board found the motion untimely because a petition for reconsideration of a final decision must be filed within 10 days of the date of the decision. *See* 10 C.F.R. § 2.1259(b), incorporating by reference 10 C.F.R. § 2.771. Second, the Board noted that reconsideration motions are an opportunity to request correction of a Board error by refining an argument, or by pointing out a factual misapprehension or a controlling decision or law that was overlooked. New arguments are improper. *See Louisiana Energy Services, L.P.* (Claiborne Enrichment Center), CLI-97-2, 45 NRC 3, 4 (1997). Peterson's Second Petition did not address any error of the Board; rather, Mr. Peterson attempted to introduce matters related to a DEIS that was issued after he had filed his First Petition. In the Board's view, "[Mr.] Peterson has provided nothing that gives the Board reason to take . . . action." *See* Sept. 25 Order, slip op. at 2.

The Board ruled that Peterson's Second Petition could not be considered a valid new petition to intervene regarding the DEIS. Taken as such, the Board ruled, Peterson's Second Petition was inexcusably late⁴ and did not establish good cause for lateness or address the other late-filing factors set forth in 10 C.F.R. § 2.714. Further, the Board pointed out that Peterson's Second Petition neither established standing⁵ nor set forth any admissible contentions.⁶

Mr. Peterson submitted this appeal "for intervener [*sic*] status" in response to the Board's denial of his Second Petition.⁷

II. DISCUSSION

We affirm. The Board's handling of Mr. Peterson's petitions was entirely reasonable. Mr. Peterson did not describe in any pleading a legally cognizable interest in the PFS proceeding or propose an admissible contention. Nor did he provide good cause for failure to file on time or provide a clear statement of how

⁴The NRC Staff made the DEIS available to the public on June 23, 2000. *See* Fed. Reg. 39,206 (June 23, 2000). Thirty-eight potential alternative sites for PFS's ISFSI are discussed therein. Although the Pigeon Spur site advocated by Mr. Peterson is not addressed, the potential alternative sites are the same as those considered in the environmental report filed by PFS with its license application in June 1997. *See* LBP-98-7, 47 NRC 142, 157 (1998). Peterson's Second Petition was filed more than 80 days after the DEIS was publicly noticed and more than 3 years after the information became available in this proceeding.

⁵*See Portland General Electric Co.* (Pebble Springs Nuclear Plant, Units 1 and 2), CLI-76-27, 4 NRC 610, 613-14 (1976).

⁶New environmental contentions based on the Staff's DEIS are permitted if data or conclusions in the DEIS differ significantly from the Applicant's environmental report. 10 C.F.R. § 2.714(b)(2)(iii). *See supra* note 4.

⁷Mr. Peterson also filed an unauthorized reply brief. *See* Reply — Appeal to the Commission for Intervener [*sic*] Status (Response to 10/16/00 Actions of the NRC Staff and PFS Attorneys) (Oct. 28, 2000); 10 C.F.R. § 2.714a(a).

his participation would contribute to the proceeding. His failure to articulate a legal theory supporting his intervention is fatal to his cause. Mr. Peterson's brief on appeal points to no error of law or abuse of discretion that might serve as grounds for reversal of the Board's decision. *See, e.g., International Uranium (USA) Corp. (White Mesa Uranium Mill)*, CLI-98-6, 47 NRC 116, 118 (1998); *Yankee Atomic Electric Co. (Yankee Nuclear Power Station)*, CLI-98-21, 48 NRC 185, 201 (1998).

III. CONCLUSION

We affirm the Licensing Board's rulings denying Mr. Peterson's intervention requests. We specifically approve both the Board's reasoning and its result.⁸

IT IS SO ORDERED.

For the Commission

ANNETTE L. VIETTI-COOK
Secretary of the Commission

Dated at Rockville, Maryland,
this 17th day of November 2000.

⁸ See LBP-00-23, *supra*; Order Denying Motion for Reconsideration/Intervention Petition (unpublished) (Sept. 25, 2000).

UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

COMMISSIONERS:

Richard A. Meserve, Chairman
Greta Joy Dicus
Nils J. Diaz
Edward McGaffigan, Jr.
Jeffrey S. Merrifield

In the Matter of

Docket Nos. 50-333-LT
50-286-LT
(consolidated)

POWER AUTHORITY OF THE
STATE OF NEW YORK and
ENERGY NUCLEAR FITZPATRICK LLC,
ENERGY NUCLEAR INDIAN
POINT 3 LLC, and
ENERGY NUCLEAR OPERATIONS, INC.
(James A. FitzPatrick Nuclear Power
Plant; Indian Point, Unit 3)

November 27, 2000

This proceeding concerns applications for approval of license transfers for the FitzPatrick and Indian Point 3 nuclear power plants. The Commission finds that three Petitioners to intervene have demonstrated standing and that each has proffered an admissible issue. Therefore, the Commission grants their requests for hearing. The Commission also permits a county to participate as a governmental entity. Finally, the Commission addresses various procedural issues and sets a schedule for the remainder of the proceeding.

LICENSE TRANSFER: PURPOSE OF ADJUDICATION

The purpose of this license transfer adjudication is to resolve whether, for the reasons raised by the Petitioners, the Commission should disapprove the two

transfers at issue here and require the Applicants to return the plant ownership to the *status quo ante* or modify the license — notwithstanding the Staff’s orders and the Applicants’ actual consummation of the sale. *See Vermont Yankee Nuclear Power Corp.* (Vermont Yankee Nuclear Power Station), CLI-00-17, 52 NRC 79, 82-83 (2000).

RULES OF PRACTICE: CONSOLIDATED HEARINGS

LICENSE TRANSFER

Given that the Petitioners to intervene present arguments applicable to both the FitzPatrick and Indian Point 3 plants, the Commission believes that the parties’ and the Commission’s resources are better spent by addressing these arguments only once. The Commission therefore grants one of the Petitioners’ motion to consolidate the FitzPatrick and Indian Point 3 license transfer proceedings.

RULES OF PRACTICE: STAY

LICENSE TRANSFER

The pendency of parallel proceedings before other forums is not adequate grounds to stay a license transfer adjudication. *See Niagara Mohawk Power Corp.* (Nine Mile Point Nuclear Station, Units 1 and 2), CLI-99-30, 50 NRC 333, 343-44 (1999).

RULES OF PRACTICE: SANCTIONS; REQUEST FOR HEARING

Applicants assert that Cortlandt’s Motion for Hearing should be denied because Cortlandt failed to serve the Applicants in a manner that ensured delivery on the due date of filing. The Commission considers such a sanction too severe for the offense. Cortlandt has acknowledged its error, apologized, and explained that it was based on a “communications error” with the Commission’s Office of the Secretary. Also, Applicants do not appear to have suffered any prejudice as a result of Cortlandt’s error. The Commission therefore denies Applicants’ motion.

RULES OF PRACTICE: SUBPART M; FORMAL HEARING

LICENSE TRANSFER

RULES OF PRACTICE: WAIVER OF REGULATION

10 C.F.R. § 2.1329

Motions for a Subpart G proceeding are expressly prohibited in Subpart M proceedings, pursuant to 10 C.F.R. § 2.1322(d). *See Vermont Yankee Nuclear*

Power Corp. (Vermont Yankee Nuclear Power Station), CLI-00-20, 52 NRC 151, 162 (2000). The Commission rejects Petitioner's position that this license transfer proceeding nevertheless falls within the bounds of 10 C.F.R. § 2.1329, providing for waiver of rules (here, 10 C.F.R. § 2.1322(d)) under "special circumstances" that demonstrate that the "application of a rule or regulation would not serve the purposes for which it was adopted." As "special circumstances," the Petitioner points to the fact that "the matters in this license transfer are not strictly 'financial in nature' as contemplated in the promulgation of Subpart M." This interpretation of the appropriate scope of Subpart M procedures is, in the Commission's view, overly restrictive. The Subpart M rules are intended to apply to more than just those cases presenting only financial issues.

Petitioner alternatively asks that the Commission initiate a Subpart M hearing, but consider the possibility of converting it to a Subpart G hearing at a later date. Petitioner is asking nothing more than what the Commission's regulations already provide. See 10 C.F.R. § 2.1322(d) ("The Commission, on its own motion, or in response to a request from a Presiding Officer . . . , may use additional procedures, such as direct and cross-examination, or may convene a formal hearing under subpart G of this part on specific and substantial disputes of fact . . . that cannot be resolved with sufficient accuracy except in a formal hearing"). The Commission therefore denies Petitioner's request as unnecessary.

RULES OF PRACTICE: CONSOLIDATED HEARINGS

A Petitioner moves for a consolidated hearing by the Commission, FERC, and the New York State Department of Environmental Conservation. The Commission believes that holding a consolidated hearing would be impractical in the particular circumstances of this proceeding, given that each agency would be operating under a different set of procedural rules and governing statutes. Moreover, FERC has already concluded its parallel proceeding involving the FitzPatrick and Indian Point 3 plants.

RULES OF PRACTICE: PROTECTIVE ORDER; CLOSED HEARING

The Commission recognizes that the lack of access to the Applicants' full financial information could affect Petitioners' ability to present their substantive case at the hearing. Petitioners should discuss access to proprietary information with the Applicants and thereafter file with the Presiding Officer a mutually agreeable protective order. If the parties cannot agree on a protective order, Petitioners may move for issuance of such an order. See *GPU Nuclear, Inc.* (Oyster Creek Nuclear Generating Station), CLI-00-6, 51 NRC 193, 211 (2000);

North Atlantic Energy Service Corp. (Seabrook Station, Unit 1), CLI-99-27, 50 NRC 257, 268 (1999); *North Atlantic Energy Service Corp.* (Seabrook Station, Unit 1), CLI-99-6, 49 NRC 201, 225 (1999); *North Atlantic Energy Service Corp.* (Seabrook Station, Unit 1), unpublished Protective Order of Presiding Officer, 1999 WL 202690 (Mar. 24, 1999). Cf. 10 C.F.R. § 2.740(c)(6). Moreover, portions of the hearing may have to be closed to the public when issues involving proprietary information are being addressed.

RULES OF PRACTICE: INTERVENTION

To intervene as of right in any Commission licensing proceeding, a petitioner must demonstrate that its “interest may be affected by the proceeding,” i.e., it must demonstrate “standing.” See AEA § 189a, 42 U.S.C. § 2239(a). The Commission’s rules for license transfer proceedings also require that a petition to intervene raise at least one admissible issue. See 10 C.F.R. § 2.1306.

RULES OF PRACTICE: INTERVENTION (STANDING)

LICENSE TRANSFER

To demonstrate standing in a Subpart M license transfer proceeding, the petitioner must

- (1) identify an interest in the proceeding by
 - (a) alleging a concrete and particularized injury (actual or threatened) that
 - (b) is fairly traceable to, and may be affected by, the challenged action [e.g., the grant of an application to approve a license transfer], and
 - (c) is likely to be redressed by a favorable decision, and
 - (d) lies arguably within the “zone of interests” protected by the governing statute(s).
- (2) specify the facts pertaining to that interest.

See 10 C.F.R. §§ 2.1306, 2.1308; *Nine Mile Point*, CLI-99-30, 50 NRC at 340-41 & n.5 (and cited authority). Moreover, an organization that seeks representational standing must demonstrate how at least one of its members may be affected by the licensing action, must identify that member by name and address, and must show (preferably by affidavit) that the organization is authorized to request a hearing on behalf of that member. See *Vermont Yankee*, CLI-00-20, 52 NRC at 163; *Oyster Creek*, CLI-00-6, 51 NRC at 202 (and cited authority).

RULES OF PRACTICE: INTERVENTION (STANDING)

LICENSE TRANSFER

The Commission recently granted standing in license transfer proceedings to petitioners who (like CAN) raised similar assertions and who (again like CAN)

were authorized to represent members living or active quite close to the site. *See Vermont Yankee*, CLI-00-20, 52 NRC at 163-64; *Oyster Creek*, CLI-00-6, 51 NRC at 202-03; *Monticello*, CLI-00-14, 52 NRC at 47. Based on these similarities, the Commission concludes that CAN has satisfied the Commission's standing requirements and is granted standing with respect to both the FitzPatrick and Indian Point 3 license transfers.

RULES OF PRACTICE: INTERVENTION (STANDING)

LICENSE TRANSFER

Given that the Commission has found that people living or active within a few miles of a nuclear plant have shown standing in license transfer cases, it follows that employees who work *inside* a plant should ordinarily be accorded standing as well, as long as the alleged injury is fairly traceable to the license transfer. Here the [employee] Association has made a sufficient linkage to establish standing. The Association's concerns, if substantiated at a hearing, would be redressed by a favorable decision.

RULES OF PRACTICE: INTERVENTION (STANDING)

LICENSE TRANSFER

Cortlandt and the Hendrick Hudson School District collectively seek standing in the Indian Point 3 license transfer proceeding on the grounds that the Indian Point 3 plant is located within the boundaries of both governmental entities and that the plant's safe operation and decommissioning is of great concern to the safety and long-term economic well-being of the Town and School District communities. The Commission finds that, for these reasons, Cortlandt has demonstrated standing with respect to the Indian Point 3 license transfer application. *See Vermont Yankee*, CLI-00-20, 52 NRC at 164. Moreover, Cortlandt is the locus of the Indian Point 3 plant and therefore is in a position analogous to that of an individual living or working within a few miles of a plant whose license may be transferred.

RULES OF PRACTICE: GOVERNMENTAL PARTICIPATION

LICENSE TRANSFER

Westchester, the County where the Indian Point 3 plant is located, seeks participant (but not intervenor) status in this proceeding, citing 10 C.F.R. § 2.715(c). The Commission, as it indicated in *Nine Mile Point*, CLI-99-30, 50 NRC at 344, "has long recognized the benefits of participation in our proceedings by representatives of interested states, counties, municipalities, etc."

The Commission therefore grants Westchester's request for participant status regarding the Indian Point 3 license transfer.

LICENSE TRANSFER

RULES OF PRACTICE: ADMISSIBILITY OF ISSUES; INTERVENTION (ADMISSIBILITY OF ISSUES)

To demonstrate that issues are admissible under Subpart M, a Petitioner must

- (1) set forth the issues (factual and/or legal) that petitioner seeks to raise,
- (2) demonstrate that those issues fall within the scope of the proceeding,
- (3) demonstrate that those issues are relevant and material to the findings necessary to a grant of the license transfer application,
- (4) show that a genuine dispute exists with the applicant regarding the issues, and
- (5) provide a concise statement of the alleged facts or expert opinions supporting petitioner's position on such issues, together with references to the sources and documents on which petitioner intends to rely.

See 10 C.F.R. § 2.1308; *Nine Mile Point*, CLI-99-30, 50 NRC at 342 (and cited authority). These standards do not allow mere "notice pleading"; the Commission will not accept "the filing of a vague, unparticularized" issue, unsupported by alleged fact or expert opinion and documentary support. *See Seabrook*, CLI-99-6, 49 NRC at 219 (citation and internal quotation marks omitted). General assertions or conclusions will not suffice. This is not to say, however, that the Commission's threshold admissibility requirements should be turned into a "fortress to deny intervention." *Cf. Duke Energy Corp.* (Oconee Nuclear Station, Units 1, 2, and 3), CLI-99-11, 49 NRC 328, 335 (1999), quoting *Philadelphia Electric Co.* (Peach Bottom Atomic Power Station, Units 2 and 3), ALAB-216, 8 AEC 13, 21 (1974).

LICENSE TRANSFER

RULES OF PRACTICE: ADMISSIBILITY OF ISSUES; INTERVENTION (ADMISSIBILITY OF ISSUES); GLOBAL ISSUES

Petitioners raise two general concerns: (i) a claimed decline in the educational opportunities and talent necessary for an effective nuclear workforce in the United States and (ii) an alleged overconcentration in the ownership of nuclear power plants. These may well be significant questions warranting Commission inquiry. Indeed, as the Commission recently pointed out in *Vermont Yankee*, the NRC Staff, at Commission direction, already is examining the industry consolidation question. *See* CLI-00-20, 52 NRC at 172. But an individual license transfer adjudication is not an appropriate forum for a legislative-like inquiry into issues affecting the entire nuclear industry. *See id.* The Commission therefore declines

to admit for hearing Petitioners' general issues on a declining nuclear workforce and on overly concentrated ownership.

FINANCIAL QUALIFICATIONS

LICENSE TRANSFER

10 C.F.R. § 50.33(f)

RULES OF PRACTICE: INTERVENTION (ADMISSIBILITY OF ISSUES)

Petitioner points specifically to two financial obligations (the Facilities Payment Note and the Fuel Payment Note) as sources of joint and several liability for the FitzPatrick and Indian Point 3 plants, and asserts that PASNY's 3.6 cent per kilowatt-hour payments to the new owner of these plants would be insufficient to satisfy the new owner's obligations at both FitzPatrick and Indian Point 3. Moreover, Cortlandt's expert concludes that the estimated net operating income from Indian Point 3 for the next 7 years would, under certain assumptions, be insufficient to cover the facility and fuel payments during that time. These allegations, backed by an expert's affidavit, create a genuine dispute warranting a hearing.

FINANCIAL QUALIFICATIONS

LICENSE TRANSFER

10 C.F.R. § 50.33(f)

RULES OF PRACTICE: INTERVENTION (ADMISSIBILITY OF ISSUES)

The Commission declines to admit the issue whether Entergy Indian Point, as a limited liability company, may not have the necessary resources to protect the environment and meet its legal, contractual, and regulatory obligations to its employees, PASNY (pursuant to the Indian Point 3 and FitzPatrick sales contracts), and those who may be injured or suffer property damage in a nuclear accident.

FINANCIAL QUALIFICATIONS

LICENSE TRANSFER

10 C.F.R. § 50.33(f)

RULES OF PRACTICE: INTERVENTION (ADMISSIBILITY OF ISSUES)

The “sufficiency” *vel non* of the transferee’s supplemental funding does not constitute grounds for a hearing. In *Vermont Yankee*, the Commission recently declined to admit essentially the same issue on the ground that NRC rules do not mandate supplemental funding. “The parent company guarantee is supplemental information and not material to the financial qualifications determination under 10 C.F.R. § 50.33(f)(2).” *See* CLI-00-20, 52 NRC at 175, citing *Oyster Creek*, CLI-00-6, 51 NRC at 205. *See also Vermont Yankee*, CLI-00-20, 52 NRC at 178. Petitioner has given the Commission no reason to reach a different conclusion in the instant proceeding.

FINANCIAL QUALIFICATIONS

LICENSE TRANSFER

10 C.F.R. § 50.33(f)

RULES OF PRACTICE: INTERVENTION (ADMISSIBILITY OF ISSUES)

Petitioners’ claim of revenue shortfalls essentially challenges the transferee’s cost and revenue projections — precisely the kind of challenge the Commission indicated would be acceptable if based on sufficient facts, expert opinion, or documentary support. *See Oyster Creek*, CLI-00-6, 51 NRC at 207, 208, citing *Seabrook*, CLI-99-6, 49 NRC at 219-21. Although Petitioners’ version of the issue appears only in its petition, without backup support, the Commission believes that Petitioners’ explanation regarding the unavailability of relevant data entitles it to gain access to the data through a protective order before being held to the NRC’s usual specificity requirements. The Commission therefore authorizes Petitioners to submit a properly formulated and supported financial qualifications issue within 20 days of the entry of a protective order.

FINANCIAL QUALIFICATIONS

LICENSE TRANSFER

10 C.F.R. § 50.33(f)

RULES OF PRACTICE: INTERVENTION (ADMISSIBILITY OF ISSUES)

Subpart M calls for “specificity” in pleadings. *See Northeast Nuclear Energy Co.* (Millstone Nuclear Power Station, Units 1, 2, and 3), CLI-00-18, 52 NRC 129, 131-32 (2000). However, in the unusual setting here, where critical information has been submitted to the NRC under a claim of confidentiality and was not available to Petitioners when framing their issues, it is appropriate to defer ruling on the admissibility of an issue until the petitioner has had an opportunity to review this information and submit a properly documented issue.

FINANCIAL QUALIFICATIONS

LICENSE TRANSFER

10 C.F.R. § 50.33(f)

RULES OF PRACTICE: INTERVENTION (ADMISSIBILITY OF ISSUES)

“Absolute certainty” in financial forecasts is impossible, and the Commission does not require it. *See Seabrook*, CLI-99-6, 49 NRC at 221-22. Challenges to Entergy’s financial qualifications “ultimately will prevail only if [they] can demonstrate relevant uncertainties significantly greater than those that usually cloud business outlooks.” *Id.* at 222.

LICENSE TRANSFER: PRICE-ANDERSON ACT

PRICE-ANDERSON ACT: LICENSE TRANSFER

CAN asserts that Entergy’s supplemental \$90 million will prove inadequate to cover Entergy’s various potential liabilities, including its Price-Anderson Act responsibility. The Commission, in its recent *Vermont Yankee* decision, rejected an identical Price-Anderson claim by CAN:

[N]othing about Price-Anderson coverage changes as a result of this license transfer. The same coverage will exist after license transfer as exists today. Moreover, contrary to what CAN suggests, Price-Anderson indemnification agreements continue in effect even after plants have ceased permanent operation and are engaged in decommissioning. *See* 10 C.F.R.

§ 140.92 (NRC Indemnification Agreement, art. VII); 10 C.F.R. § 50.54(w). Thus, CAN's Price-Anderson argument is ill-conceived

CLI-00-20, 52 NRC at 175. In that same decision, the Commission further commented on the analogous Price-Anderson argument of another petitioner (Vermont) that “our regulations only require it to show that it has sufficient cash equivalents (such as the parent company guarantee) to cover the retroactive \$10 million premium required by our regulations at 10 C.F.R. § 140.21(e)-(f). *See Oyster Creek*, CLI-00-6, 51 NRC at 206. . . . Vermont’s argument that the applicant must meet financial requirements in addition to those imposed by our regulations constitutes,” in effect, a demand for additional rules, but it does not provide an adequate basis for a hearing. “Moreover, . . . prior to issuance of the amended license [to] AmerGen Vermont, [it] must obtain all regulatorily required property damage insurance.” CLI-00-20, 52 NRC at 178; CLI-00-6, 51 NRC at 206.

FINANCIAL QUALIFICATIONS

LICENSE TRANSFER

10 C.F.R. § 50.75(e)(1)(i)-(v)

RULES OF PRACTICE: INTERVENTION (ADMISSIBILITY OF ISSUES)

By questioning whether the Applicants’ financial assurance arrangement is lawful under 10 C.F.R. § 50.75 and the “equivalent” of those otherwise prescribed in the regulations (10 C.F.R. § 50.75(e)(1)(i)-(v)), Petitioner has raised genuine disputes of law and fact which the Commission admits for hearing. Petitioner may also address the following related issues at the hearing: whether NRC approval of the transfers will deprive the Commission of authority to require PASNY to conduct remediation under decommissioning, and whether, under those circumstances, PASNY would no longer have access to the decommissioning trust fund for the remediation it would need to complete.

FINANCIAL QUALIFICATIONS

LICENSE TRANSFER

10 C.F.R. § 50.75

RULES OF PRACTICE: INTERVENTION (ADMISSIBILITY OF ISSUES)

The Commission's regulations do not require Entergy Indian Point to decommission the plant to greenfield condition.

RULES OF PRACTICE: COLLATERAL ATTACK

10 C.F.R. § 50.75

RULES OF PRACTICE: INTERVENTION (ADMISSIBILITY OF ISSUES)

10 C.F.R. § 2.1329

RULES OF PRACTICE: WAIVER OF REGULATION

Petitioner's challenge to the Applicants' use of the very decommissioning cost estimate methodology sanctioned by the Commission's rules amounts to an impermissible collateral attack on 10 C.F.R. § 50.75. *See* 10 C.F.R. § 2.1329; *Vermont Yankee*, CLI-00-20, 52 NRC at 165-66. Petitioner has not attempted to justify a waiver here of the Commission's rule prohibiting such attacks.

A different Petitioner challenges Entergy's use of the Commission's generic decommissioning cost formula. For the reasons given in *Vermont Yankee*, 52 NRC at 165-66, the Commission finds this claim inadmissible.

LICENSE TRANSFER

RULES OF PRACTICE: INTERVENTION (ADMISSIBILITY OF ISSUES)

Because Entergy Indian Point does not here seek in its application to renew or extend the Indian Point 3 operating license, Petitioner's concerns about these future possibilities do not fall within the scope of this license transfer proceeding. Moreover, a request to renew or extend the license would seem just as likely from PASNY (transferor) as from Entergy Indian Point (transferee), assuming the plant remains profitable. Finally, in posing this issue, Petitioner overlooks its right to seek intervenor status in any application for license renewal or license extension that Entergy Indian Point may file. These grounds for rejection apply equally to Petitioner's concerns regarding delayed decommissioning of the three units,

the resulting need both to store additional spent fuel on site during the plant's extended life and the resulting need to continue the storage of current spent fuel for a longer time than Petitioner had anticipated.

LICENSE TRANSFER

RULES OF PRACTICE: INTERVENTION (ADMISSIBILITY OF ISSUES)

Petitioner's concern that the Indian Point 3 facility will be used as a temporary repository for spent fuel from other nuclear facilities owned by the Entergy family of companies is pure speculation. The transfer application does not seek such authority, and the Indian Point 3 facility could not accept spent fuel from other facilities without transshipment license authority. Should Entergy ever seek such authority, Petitioner would have the right to seek intervenor status.

ATOMIC ENERGY ACT

DECOMMISSIONING FUNDS: EXCESS

The Commission does not have statutory authority to determine the recipient of excess decommissioning funds.

LICENSE TRANSFER

RULES OF PRACTICE: INTERVENTION (ADMISSIBILITY OF ISSUES)

Petitioner requests that the Commission consider the transfer in light of both the fact that Units 2 and 3 share common facilities and the possibility that Entergy Indian Point (or one of its affiliates) may acquire Indian Point Unit 2 — a possibility that Cortlandt states is specifically contemplated in the Indian Point 3 transfer agreements. The Commission declines to expand the scope of this proceeding in the two ways that Petitioner requests. Petitioner has not explained how either the commonality of facilities or Entergy's possible purchase of Unit 2 bears on the acceptability of the Indian Point 3 transfer.

LICENSE TRANSFER

DECOMMISSIONING FUNDS

10 C.F.R. § 50.82

10 C.F.R. § 50.2

The Commission sees no basis for Petitioner’s concern that transferor’s retention of liability for offsite remediation will somehow deplete the FitzPatrick and Indian Point 3 decommissioning trust funds. Those funds are set aside in a trust specifically and exclusively dedicated to the purpose of decommissioning the plant sites; the trust cannot be used for offsite remediation.

Decommissioning trusts are reserved for decommissioning as defined in 10 C.F.R. § 50.2. Thus, offsite remediation would not be an accepted expense. However, some licensees use the decommissioning trust to accumulate funds for both “decommissioning” as NRC defines it and decommissioning in the broader sense that includes interim spent fuel management, nonradioactive structure demolition, and site remediation to greenfield status. The Commission accepts this approach as long as the NRC-defined “decommissioning” funds are clearly earmarked. Also, once the funds are in the decommissioning trust, withdrawals are limited by 10 C.F.R. § 50.82, so that non-“decommissioning” funds (again, as defined by the NRC) could only be spent after the NRC-defined “decommissioning” work had been finished or committed.

RULES OF PRACTICE: COLLATERAL ATTACK

LICENSE TRANSFER: DECOMMISSIONING EXPENSES

NEPA: ENVIRONMENTAL IMPACT STATEMENT

RULES OF PRACTICE: WAIVER OF REGULATION

10 C.F.R. § 50.75(c)

10 C.F.R. § 2.1329

10 C.F.R. § 51.22(c)(21)

As the Commission held in *Vermont Yankee*, CLI-00-20, 52 NRC at 167, the agency’s regulations do not require a license transfer application to provide an estimate of the actual decommissioning and site cleanup costs. Instead, the Commission’s decommissioning funding regulation (10 C.F.R. § 50.75(c)) generically establishes the amount of decommissioning funds that must be set aside. A petitioner cannot challenge the regulation in a license transfer adjudication. The NRC’s decommissioning funding rule reflects a deliberate decision not to require site-specific estimates in setting decommissioning funding

levels. *See also Northern States Power Co.* (Monticello Nuclear Generating Plant; Prairie Island Nuclear Generating Plant, Units 1 and 2; Prairie Island Independent Spent Fuel Storage Installation), CLI-00-14, 52 NRC 37, 59 (2000). Petitioner has neither sought a waiver of that rule in this proceeding (*see* 10 C.F.R. § 2.1329; *Seabrook*, CLI-99-6, 49 NRC at 217 n.8) nor reconciled Petitioner’s demand for a NEPA review with the NRC rules’ “categorical exclusion” of license transfers from NEPA requirements. *See* 10 C.F.R. § 51.22(c)(21).

As the Commission also held in *Vermont Yankee*, CLI-00-20, 52 NRC at 167, the argument that decommissioning technology is still in an experimental stage fails for the same reason, i.e., it is a collateral attack on 10 C.F.R. § 50.75(c) establishing the amount of decommissioning funds that must be set aside. *See also Northern States Power Co.* (Monticello Nuclear Generating Plant), CLI-00-14, 52 NRC 37, 59 (2000). It is worth noting that the NRC rule that CAN attacks, 10 C.F.R. § 50.75(c), is in fact supported by a generic environmental impact statement. *See* Generic Environmental Impact Statement, NUREG-0586 (August 1988) (issued in conjunction with the promulgation of 10 C.F.R. §§ 50.75 and 50.82). *See generally* Final Rule, “General Requirements for Decommissioning Nuclear Facilities,” 53 Fed. Reg. 24,018, 24,051 (June 27, 1988).

LICENSE TRANSFER: ADMISSIBILITY OF ISSUES

ANTITRUST REVIEW

ATOMIC ENERGY ACT

The fact that a particular license transfer may have antitrust implications does not remove it from the NEPA categorical exclusion. In any event, because the AEA does not require, and arguably does not even allow, the Commission to conduct antitrust evaluations of license transfer applications, the Commission’s purported “failure” to conduct such an evaluation cannot constitute a federal action warranting a NEPA review. *Vermont Yankee*, CLI-00-20, 52 NRC at 167-68 (footnote omitted).

NEPA: ENVIRONMENTAL IMPACT STATEMENT

Petitioner seeks an EIS on the ground that the problems at Indian Point 3 that persuaded Entergy to pass up an opportunity to become the plant’s operator in 1996 still exist. Petitioner later broadens this argument so as to seek an EIS on the new owners’ operation of both plants. The Commission excludes the first EIS issue (as broadened) on the ground that the scope of this proceeding does not include the new owners’ operation of the plants — but includes only the transfer of their operating licenses.

LICENSE TRANSFER: TECHNICAL QUALIFICATIONS

Petitioner raises an array of challenges to the technical qualifications of the workforce that will be employed at FitzPatrick and Indian Point 3 once the Entergy companies take over those plants. Petitioner's claims, however, are not directly linked to the license transfers at issue here, but rest largely on current operational issues at the two plants and on Entergy's operation of other plants, including nonnuclear plants. As in the recent *Vermont Yankee* and *Oyster Creek* decisions, where the Commission rejected claims all but identical to these, the Commission finds here that Petitioner has provided no documents, facts, or expert opinion establishing a genuine issue concerning technical qualifications. *See also Millstone*, CLI-00-18, 52 NRC at 131-32, *citing* 10 C.F.R. § 2.1306(b)(2)(iii).

LICENSE TRANSFER: ADMISSIBILITY OF ISSUES; TECHNICAL QUALIFICATIONS

The adequacy of the plant's ongoing safety-related programs is an operational issue that will remain the same whether or not the license is transferred. Consequently, the Commission has indicated that a license transfer hearing is not the proper forum in which to conduct a full-scale health-and-safety review of a plant. *See Oyster Creek*, CLI-00-6, 51 NRC at 213, 214. A petitioner may, of course, file a petition for Staff enforcement action pursuant to 10 C.F.R. § 2.206 if it is concerned about current safety issues at Vermont Yankee. *See Vermont Yankee*, CLI-00-20, 52 NRC at 169.

LICENSE TRANSFER: ADMISSIBILITY OF ISSUES; TECHNICAL QUALIFICATIONS

Absent strong support for a claim that difficulties at other plants run by a corporate parent will affect the plant(s) at issue, the Commission is unwilling to use its hearing process as a forum for a wide-ranging inquiry into the corporate parent's general activities across the country.

LICENSE TRANSFER: ADMISSIBILITY OF ISSUES; TECHNICAL QUALIFICATIONS

Petitioner has not provided the necessary nexus between the problems at other plants (some not even in this country) operated by different companies and the difficulties it anticipates from Entergy FitzPatrick, Entergy Indian Point, and Entergy Nuclear Operations. *See Oyster Creek*, CLI-00-6, 51 NRC at 209-10. Nor does it offer any factual support for its claim that the Entergy companies will subordinate safety to production goals or profits. *See Oyster Creek*, CLI-

00-6, 51 NRC at 207. Finally, Petitioner's speculation about the likelihood and ramifications of staff reductions is insufficient to trigger a hearing on this issue. Petitioner points to no information suggesting that Entergy plans to reduce its staff below NRC requirements. As the Commission stated in *Oyster Creek*:

For key positions necessary to operate a plant safely, the Commission has regulations requiring specific staffing levels and qualifications. *See* 10 C.F.R. § 50.54(m). Other than those specific positions, the licensee has a responsibility to ensure that it has adequate staff to meet the Commission's regulatory requirements. If a licensee's staff reductions or other cost-cutting decisions result in its being out of compliance with NRC regulations, then (as noted above) the agency can and will take the necessary enforcement action to ensure the public health and safety. The Oyster Creek application does not on its face suggest any likelihood of a cost-driven lapse in compliance with NRC safety rules.

CLI-00-6, 51 NRC at 209. *See also id.* at 214 ("so long as personnel decisions do not impose [a] risk [to the public health and safety], our regulations and policy do not preclude a licensee from reducing or replacing portions of its staff").

LICENSE TRANSFER: ADMISSIBILITY OF ISSUES; TECHNICAL QUALIFICATIONS (LABOR ISSUES)

As a nuclear safety agency, the Commission is loath to step into the middle of a labor dispute. The Commission has neither the expertise nor the legislative charter of a National Labor Relations Board or labor mediator. Moreover, the Commission is particularly reluctant to engage in prognostication of the impact of changes in current working conditions that may occur years in the future. Unsupported hypothetical theories or projections, even in the form of an affidavit, will not support invocation of the hearing process.

Petitioner's most specific health-and-safety claims are charges that the labor controversy will provoke high attrition and poor morale. Neither claim raises a genuine controversy for hearing. As for the purported increase in attrition, Petitioner merely says that it is so, but provides no factual data, expert witnesses, or even affidavits of employees who have or will quit as a result of the license transfer. As for morale, the Commission does not see how it could adjudicate such an abstract concept at a hearing absent some allegation of specific rule violations or specific safety challenges arising out of lower morale. Notably, Petitioner has submitted no evidence, such as inspection reports or other indicators, suggesting an increase in safety problems at the two plants.

The Commission, however, does not hold that economic concerns, whether of a labor, commercial, or other nature, are categorically excluded from the NRC hearing process. Such concerns, if closely tied to specific health-and-safety concerns or to potential violations of NRC rules, can be admitted for hearing. *See, e.g., North Atlantic Energy Service Corp.* (Seabrook Station, Unit 1), CLI-99-27,

50 NRC 257, 262-63 (1999). Indeed, in the NRC's Subpart M rulemaking, which established the agency's current license transfer hearing process, the Commission expressed a willingness to review labor-type issues to a limited extent. *See* Final Rule, "Streamlined Hearing Process for NRC Approval of License Transfers," 63 Fed. Reg. 66,721, 66,723 (Dec. 3, 1998).

The Commission generally does not involve itself in the personnel decisions of licensees. As the Commission indicated in *Oyster Creek*, "the Commission is interested in whether the plant poses a risk to the public health and safety, and so long as personnel decisions do not impose that risk, our regulations and policy do not preclude a licensee from reducing or replacing portions of its staff." CLI-00-6, 51 NRC at 214. *See also Vermont Yankee*, CLI-00-20, 52 NRC at 170 n.16 and accompanying text. The Commission would require personnel claims considerably more concrete than the Association's — i.e., specific indications of a potential rule violation or of deteriorating safety conditions linked to the license transfer — before the Commission would consider admitting plant staffing questions into an NRC license transfer hearing.

The Commission's license transfer hearings under Subpart M are designed solely to adjudicate genuine health-and-safety disputes arising out of license transfers. The grant of hearings merely on the broad assertion that contentious labor controversies will lead to deleterious health-and-safety consequences would have no stopping point and would risk converting this agency into a labor relations forum, contrary to the Commission's statutory mission and at a significant cost in resources and effort.

LICENSE TRANSFER: ADMISSIBILITY OF ISSUES

EMERGENCY PLANNING

10 C.F.R. § 50.47

10 C.F.R. PART 50, APPENDIX E

The new licensees will have to meet all of the requirements of 10 C.F.R. § 50.47 and Appendix E to 10 C.F.R. Part 50 concerning emergency planning and preparedness. The emergency notification system is required by the regulations and will remain in place. Because Petitioner has not alleged, with supporting facts, that the new Licensee is likely to violate the NRC's emergency planning rules, the Commission sees no basis for further pursuit of this issue.

LICENSE TRANSFER: ADMISSIBILITY OF ISSUES

The Commission does not see how Indian Point 3's proximity to various cities, towns, entertainment centers, and military facilities is relevant to the question whether to approve the license transfer for that plant.

LICENSE TRANSFER: ADMISSIBILITY OF ISSUES

ANTITRUST

The Commission no longer conducts antitrust reviews in license transfer proceedings. *See Vermont Yankee*, CLI-00-20, 52 NRC at 168, 174; *Oyster Creek*, CLI-00-6, 51 NRC at 210; *Kansas Gas and Electric Co.* (Wolf Creek Generating Station, Unit 1), CLI-99-19, 49 NRC 441 (1999). *See also* Final Rule, "Antitrust Review Authority: Clarification," 65 Fed. Reg. 44,649 (July 19, 2000).

LICENSE TRANSFER: ADMISSIBILITY OF ISSUES; NRC STAFF COMPETENCE

Petitioner asserts that, given the historical problems in NRC's Region I, the Commission should arrange for an independent analysis of the two plants' conditions. The Commission declines to do so for the same reasons given in *Vermont Yankee* when rejecting the same Petitioner's similar issue:

An inquiry such as the one CAN advocates would go considerably beyond the scope of our inquiry in this proceeding, i.e., AmerGen Vermont's qualifications to own and operate the Vermont Yankee plant. We also note that Region I's overall performance in overseeing Vermont Yankee is far outside the scope of a license transfer proceeding. CAN does not explain how any action taken with respect to this license transfer, whether it be denial of the license or the imposition of conditions on the transferee, could remedy CAN's broad complaints that NRC's Region I has abdicated its oversight responsibilities.

CLI-00-20, 52 NRC at 171. *See also Curators of the University of Missouri*, CLI-95-1, 41 NRC 71, 121 (1995); Final Rule, "Rules of Practice for Domestic Licensing Proceedings — Procedural Changes in the Hearing Process," 54 Fed. Reg. 33,168, 33,171 (Aug. 11, 1989) ("With the exception of NEPA issues, the sole focus of the hearing is on whether the application satisfies NRC regulatory requirements, rather than the adequacy of the NRC Staff performance").

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MEMORANDUM AND ORDER

I. INTRODUCTION

This proceeding involves applications that together seek the Commission’s authorization to transfer the operating licenses of both the Indian Point Nuclear Generating Unit No. 3 (“Indian Point 3”) and the James A. FitzPatrick Nuclear Power Plant (“FitzPatrick”). The Indian Point plant is located in Westchester County, New York, beside the Hudson River. Its property lies partially within the Town of Cortlandt and entirely within the Hendrick Hudson School District. The FitzPatrick plant is located in the town of Scriba in Oswego County, New York.

The Power Authority of the State of New York (“PASNY”) seeks to transfer its ownership interest in, and operating/maintenance responsibility for, the Indian Point 3 plant to Entergy Nuclear Indian Point 3, LLC (“Entergy Indian Point”) and Entergy Nuclear Operations, Inc. (“Entergy Nuclear Operations”), respectively. Similarly, PASNY would transfer its ownership interest in, and operating/maintenance responsibility for, the FitzPatrick plant to Entergy Nuclear FitzPatrick, LLC (“Entergy FitzPatrick”) and Entergy Nuclear Operations, respectively.

The applications were submitted to the Commission on May 11 and 12, 2000, pursuant to section 184 of the Atomic Energy Act of 1954 (“AEA”)¹ and section 50.80 of the Commission’s regulations.² On June 28, 2000, the Commission published notices of the FitzPatrick and Indian Point 3 applications in the *Federal Register*. See 65 Fed. Reg. 39,953 and 39,954, respectively.

The Commission received five petitions to intervene (or participate) and requests for hearing from individuals or entities wishing to address or oppose one or both of the license transfer applications. The Petitioners are Citizens Awareness Network (“CAN”); the Town of Cortlandt together with the Hendrick Hudson School District (collectively “Cortlandt”); Westchester County (“Westchester”) (petitioning to participate as a governmental entity); Local 1-2 of the Utility Workers of America (“the Union”); and the Nuclear Generation Employees Association, together with William Carano, Thomas Pulcher, and Richard Wiese, Jr. (collectively “the Association”).³ The Applicants filed an answer to each of these hearing requests. All Petitioners except Westchester submitted replies to the Applicants’ answers. The Union subsequently withdrew its petition. The NRC Staff is not participating as a party in the adjudicatory portion of this proceeding. See generally 10 C.F.R. § 2.1316(b), (c). We consider the pleadings under Subpart M of our procedural rules. 10 C.F.R. §§ 2.1301-2.1331.

For the reasons set forth below, we grant the requests for hearing of CAN, Cortlandt, and the Association. We also grant Westchester’s request to participate in a hearing as an interested governmental entity. Finally, we admit certain issues involving whether the Entergy companies have demonstrated their financial ability to operate and maintain the plants safely and whether they have provided a reasonable assurance of adequate decommissioning funding.

¹ 42 U.S.C. § 2234 (precluding the transfer of any NRC license unless the Commission both finds the transfer in accordance with the AEA and gives its consent in writing). On November 9, 2000, the NRC Staff issued orders approving the two applications for license transfer. Pursuant to 10 C.F.R. § 2.1327, the Petitioners in this proceeding could have asked the Commission by November 17, 2000, to stay the effect of the Staff’s two orders, but Petitioners filed no stay motion. Consequently, PASNY and the Entergy companies were free to close the sale of the two nuclear plants, which they did on November 21, 2000. Neither the Staff’s approvals, nor the closing of the sale affects the instant adjudicatory proceeding. The purpose of this proceeding is to resolve whether, for the reasons raised by the Petitioners, the Commission should disapprove the transfers and require the Applicants to return the plant ownership to the *status quo ante* or modify the license notwithstanding the Staff’s orders and the Applicants’ actual consummation of the sale. See *Vermont Yankee Nuclear Power Corp.* (Vermont Yankee Nuclear Power Station), CLL-00-17, 52 NRC 79, 82-83 (2000).

² 10 C.F.R. § 50.80. This regulation reiterates the requirements of AEA § 184, sets forth the filing requirements for a license transfer application, and establishes the following test for approval of such an application: (1) the proposed transferee is qualified to hold the license and (2) the transfer is otherwise consistent with law, regulations, and Commission orders.

³ In addition, the County of Putnam sought and was granted an extension of time until July 31, 2000, by which to file its petition to intervene and request for hearing. However, Putnam filed no petition or request.

II. THE LICENSE TRANSFER APPLICATIONS

As noted above, PASNY, Entergy FitzPatrick, and Entergy Nuclear Operations have filed applications seeking to transfer the ownership of the FitzPatrick plant to Entergy FitzPatrick and the operating and maintenance responsibilities for the plant to Entergy Nuclear Operations. The regulatory responsibility for decommissioning the plant would also transfer to Entergy FitzPatrick. Pursuant to the Decommissioning Agreements and subject to the monetary limits of those Agreements, PASNY would retain the decommissioning funds and would have a contractual obligation to provide funds to Entergy FitzPatrick (up to a specified limit) to decommission the FitzPatrick plant.⁴

Similarly, PASNY, Entergy Indian Point, and Entergy Nuclear Operations have filed applications seeking to transfer the ownership of the Indian Point plant to Entergy Indian Point and the operating and maintenance responsibilities for the plant to Entergy Nuclear Operations. The regulatory responsibility for decommissioning the plant would also transfer to Entergy Indian Point. Pursuant to the Decommissioning Agreements and subject to the monetary limits of those Agreements, PASNY would retain the decommissioning funds and would have a contractual obligation to provide funds to Entergy Indian Point (up to a specified limit) to decommission the Indian Point 3 plant.

Under both applications, however, PASNY would have the option of terminating this contractual obligation upon the occurrence of certain events specified in the Decommissioning Agreements. Upon such termination, PASNY would have no further contractual responsibility to its successor owner (Entergy FitzPatrick or Entergy Indian Point, as applicable) and no further involvement with the decommissioning process for that plant. At that point, PASNY would be required to transfer the decommissioning funds to its successor owner, subject to certain conditions.

If PASNY does not terminate its contractual responsibility before the decommissioning of the applicable plant begins, then PASNY's contractual responsibility would be carried out pursuant to the Decommissioning Agreements. Under those Agreements, PASNY and Entergy Nuclear, Inc. ("ENI") must enter into an agreement whereby ENI would decommission the plants in accordance with the Decommissioning Agreements. Entergy FitzPatrick and Entergy Indian Point, through their authorized agent, Entergy Nuclear Operations, would at all times retain ultimate control over the timing and control of the decommissioning activities of ENI and its contractors.

The new owners and the new operator of the Indian Point 3 and FitzPatrick nuclear plants are not "electric utilities" under our rules, and thus must

⁴ Commitments limiting PASNY's role to holding and disbursing the decommissioning funds are contained in a letter dated Sept. 21, 2000.

demonstrate financial qualifications to own and/or operate the plant. *See* 10 C.F.R. § 50.33(f). These Entergy companies have submitted 5-year cost and revenue projections in accordance with our rules, *see id.*, but much of their material was submitted as confidential financial information and has been withheld from public disclosure.

Upon the closing of the purchase and sales agreements, all employees within PASNY's Nuclear Generation Department, and certain other employees supporting the Nuclear Generation Department, would become employees of Entergy Nuclear Operations. The application proposes no physical or operational changes to the FitzPatrick or Indian Point facilities, but does request certain administrative changes to the licenses that are necessary to reflect the proposed transfers. *See* 65 Fed. Reg. at 39,953-54.

Before reaching Petitioners' standing and the admissibility of their issues, we must first address certain pending procedural motions.

III. PRELIMINARY PROCEDURAL ISSUES

A. CAN's Motion To Consolidate the Commission's Consideration of the Applications

CAN moves for a joint hearing on all applications. CAN argues that there are overarching concerns that affect the transfer of both facilities — concerns stemming from the Entergy companies' joint negotiation of both sales and their intertwining of the two plants' finances, day-to-day operations, and reactor decommissioning. *See* CAN's Petition, dated July 31, 2000, at 7. Conversely, Cortlandt objects to such a consolidation. Cortlandt states that the issuance of separate orders for each facility would be in the public interest because it "would facilitate review thereof and action thereupon."⁵ However, Cortlandt has offered us no rationale to justify this conclusion. Given that CAN and the Association present a number of arguments applicable to both plants, we believe that the parties' and the Commission's resources are better spent by addressing these arguments only once. We therefore grant CAN's motion to consolidate the FitzPatrick and Indian Point 3 license transfer proceedings.

B. The Association's and CAN's Motions for Stay

The Association seeks a stay of this NRC proceeding pending a decision by the New York courts regarding the rights, obligations, and liabilities of its members, the Entergy companies, and PASNY. *See* Association's Petition to Intervene,

⁵ *See* Cortlandt's Petition for Extension of Time, dated July 7, 2000, at 4 n.1. This petition, despite its name, includes both a petition to intervene and request for hearing.

dated July 17, 2000, at 19, 21. The Association brought that state court action on July 27, 2000.⁶ In support, the Association asserts that the state court action could render void or voidable the sales transaction involving the two plants, that the outcome of the state court action could assist in clarifying the Commission record, and that consummation of the sales transaction could render irreversible many aspects of the Association members' relationship with the Applicants. *See* Association's Reply Brief, dated Aug. 3, 2000, at 26.

Similarly, CAN seeks a stay of the adjudication until the Internal Revenue Service ("IRS"), the Federal Energy Regulatory Commission ("FERC") and the New York State Department of Environmental Conservation ("DEC") have completed their own proceedings involving the transfer of the two plants.⁷ CAN asserts that these agencies' rulings could affect the Entergy companies' ability to own, operate, and decommission the two plants,⁸ and that DEC or IRS rulings adverse to Entergy could render the sales agreement void or voidable.⁹

As we indicated in a prior case, the pendency of parallel proceedings before other forums is not adequate grounds to stay a license transfer adjudication. *See Niagara Mohawk Power Corp.* (Nine Mile Point Nuclear Station, Units 1 and 2), CLI-99-30, 50 NRC 333, 343-44 (1999). We therefore deny the motions for a stay. However, we instruct the parties to inform the Commission promptly of any court or administrative decision that might in any way relate to, or render moot, all or part of the instant proceeding. Similarly, if at any point the parties to this proceeding reach a settlement of this dispute, or if the transfer Applicants decide

⁶ *See* Verified Petition, *Nuclear Generation Employees Ass'n v. New York Power Auth.* (Sup. Ct., Westchester Co., NY), Index No. 11129/00 (filed July 27, 2000) (appended to Association's Reply Brief as Exh. 1). *See also* Association's Reply Brief, dated Aug. 3, 2000, at 3. We note in passing that, on July 26, 2000, the Town of Cortland filed a separate action in New York State court, also challenging the transfer. *See* Verified Petition, *Town of Cortland v. Power Auth. of the State of New York* (Sup. Ct., Westchester Co., NY), Index No. 11084-00 (filed July 26, 2000) (appended to Cortland's Supplemental Statement, dated July 31, 2000) (hereafter "Cortland Verified Petition"), *petition denied* (Sept. 15, 2000), *appeal noticed* (Sept. 22, 2000) (court denial and appeal notice both appended to Cortland's Submission of Supplemental Information, dated Sept. 28, 2000). *See also* Affirmation of Peter Henner, dated July 31, 2000, ¶ 29 (appended to Cortland's Supplemental Statement, dated July 31, 2000). (We cite to the paragraph rather than the page number of Mr. Henner's Affirmation because neither version of this document is paginated and because the contents of the first version appear on different pages from the same content of the second version.)

⁷ On Sept. 29, 2000, FERC authorized Entergy Indian Point's and Entergy FitzPatrick's purchase of the Indian Point 3 and FitzPatrick nuclear plants, respectively, from PASNY. *See Entergy Nuclear Indian Point 3, LLC, and Entergy Nuclear FitzPatrick, LLC*, Docket No. EC00-100-000, "Order Authorizing Disposition of Jurisdictional Facilities," 92 FERC ¶ 61,281 (Sept. 29, 2000).

Separately, it is not at all clear whether there is any request or proceeding pending before the IRS. Such a request appears to be the assumption on which one of the Association's issues rests (*see* Association's Petition at 18, referring to the potential effects of "[a] contrary ruling by the IRS"), and also is expressly one of the assumptions on which CAN bases its instant stay request. However, the record contains no indication that the Applicants have ever sought such an IRS ruling. Conversely, the Applicants' responses to the Association's (and CAN's) arguments never deny seeking an IRS ruling.

⁸ *See* CAN's Petition at 1-7. *See also id.* at 14 (rapid consolidation of nuclear industry justifies a stay pending changes in NRC regulations and enforcement practices); CAN's Reply Brief, dated Aug. 17, 2000, at 5-6.

⁹ CAN's Reply Brief at 6.

to withdraw or postpone their application, we expect immediate notification to the Commission.

C. Applicants' Request To Deny Cortlandt's Hearing Motion on Procedural Grounds

Applicants assert that Cortlandt's Motion for Hearing should be denied because Cortlandt failed to serve the Applicants in a manner that ensured delivery on the due date of filing. *See* Answer to Cortlandt's Petition, dated Aug. 14, 2000, at 3-4. We consider such a sanction too severe for the offense. Cortlandt has acknowledged its error, apologized, and explained that it was based on a "communications error" with the Commission's Office of the Secretary. *See* Cortlandt's Reply Brief, dated Aug. 21, 2000, at 8. Also, Applicants do not appear to have suffered any prejudice as a result of Cortlandt's error. We therefore deny their motion.

D. CAN's Motion for a Formal Subpart G Hearing

In both a separate motion and throughout its presentation on standing and issues, CAN requests a formal hearing under Subpart G of our procedural regulations. *See* CAN's Petition at 9-11, 22, 23, 29, 36, 42, 47, 51, 55, 56, 64, 66; CAN's Reply Brief at 4-5, 9-10, 12. CAN's motion for a Subpart G proceeding is expressly prohibited under 10 C.F.R. § 2.1322(d). *See Vermont Yankee Nuclear Power Corp.* (Vermont Yankee Nuclear Power Station), CLI-00-20, 52 NRC 151, 162 (2000).

In an effort to avoid this prohibition, CAN asserts that this proceeding falls within the bounds of 10 C.F.R. § 2.1329, providing for waiver of rules under "special circumstances" that demonstrate that the "application of a rule or regulation would not serve the purposes for which it was adopted." As "special circumstances," CAN points to the fact that "the matters in this license transfer are not strictly 'financial in nature' as contemplated in the promulgation of Subpart M." *See* CAN's Petition at 9.

CAN's interpretation of the appropriate scope of Subpart M procedures is, in our view, overly restrictive. Our Subpart M rules are intended to apply to more than just those cases presenting only financial issues. We expected when promulgating Subpart M that most issues would be financial,¹⁰ and indeed this expectation has been fulfilled. However, we also predicted that Petitioners would raise other categories of issues as well (such as foreign ownership, technical qualifications, and appropriate critical staffing levels) — a prediction that has

¹⁰ *See Nine Mile Point*, CLI-99-30, 50 NRC at 345.

also been fulfilled.¹¹ For that reason, when promulgating Subpart M, we expressly declined to adopt the nuclear industry trade organization's suggestion that we limit the scope of Subpart M proceedings to financial matters.¹² We deny CAN's motion for essentially the same reason. The nature of Petitioners' financial and technical allegations do not call for an alteration in the usual Subpart M process.

As an alternative request, CAN moves for a consolidated hearing by the Commission, FERC, and DEC. *See* CAN's Petition at 11; CAN's Reply Brief at 7-8. We believe holding a consolidated hearing would be impractical in the particular circumstances of this proceeding, given that each agency would be operating under a different set of procedural rules and governing statutes. Moreover, as indicated in note 7, *supra*, FERC has already concluded its parallel proceeding involving the FitzPatrick and Indian Point 3 plants.

Finally, as a second alternative request, CAN asks that the Commission initiate a Subpart M hearing, but consider the possibility of converting it to a Subpart G hearing at a later date. *See* CAN's Reply Brief at 9. In our view, CAN is asking nothing more than the Commission's regulations already provide. *See* 10 C.F.R. § 2.1322(d) ("The Commission, on its own motion, or in response to a request from a Presiding Officer . . . , may use additional procedures, such as direct and cross-examination, or may convene a formal hearing under subpart G of this part on specific and substantial disputes of fact . . . that cannot be resolved with sufficient accuracy except in a formal hearing"). We deny CAN's second alternative request as unnecessary.

E. Petitioners' Request for Access to Unredacted Versions of Financial Information

Cortlandt asserts that its lack of access to certain confidential financial information (e.g., the 5-year estimates of Indian Point 3's annual operating costs, the credit agreement, and the financial statements for Entergy International Ltd., Entergy Global Investments, LLC, and Entergy Indian Point) precludes it from fully presenting its arguments. *See* Cortlandt's Petition at 8; Cortlandt's Supplemental Filing, dated July 31, 2000, at 3; Cortlandt's Reply Brief at 4-7. *See generally* Affirmation of Peter Henner ¶ 10 ("materials made available in the public record are insufficient for an assessment of [Entergy Indian Point]'s ability

¹¹ *See Vermont Yankee*, CLI-00-20, 52 NRC at 168-70 (petitioners raised issues involving technical qualifications); *Northern States Power Co.* (Monticello Nuclear Generating Plant; Prairie Island Nuclear Generating Plant, Units 1 and 2; Prairie Island Independent Spent Fuel Storage Installation), CLI-00-14, 52 NRC 37 (2000) (petitioners raised issues regarding the proposed licensee's technical qualifications), *reconsideration denied*, CLI-00-19, 52 NRC 135 (2000); *Duquesne Light Co.* (Beaver Valley Power Station, Units 1 and 2), CLI-99-23, 50 NRC 21 (1999) (petitioner raised labor issues between union and management relating to plant safety); *Duquesne Light Co.* (Beaver Valley Power Station, Units 1 and 2), CLI-99-25, 50 NRC 224 (1999) (same).

¹² *See* Final Rule, "Streamlined Hearing Process for NRC Approval of License Transfers," 63 Fed. Reg. 66,721, 66,724 (Dec. 3, 1998).

[to] operate under the issued license and to restore the [Indian Point 3] site to greenfield status’’); Letter from George E. Sansoucy to Paul V. Nolan, Esq., dated July 28, 2000, at 1 (‘‘Sansoucy Letter’’), appended to Cortlandt’s Supplemental Filing. More specifically, Cortlandt’s expert notes that

[I]t is not possible to render an opinion as to whether the income stream to Entergy will be sufficient to make the required payments. A particular problem is that the fuel payment stream cited in the application is for the combined fuel assets of [Indian Point] 3 and James A. FitzPatrick Nuclear Generating Station and does not allocate the portion of payments assigned to each site [citing Purchase and Sale Agreement at 14].

[I]t is not possible to estimate the ability of Entergy to fund required payments to the Decommissioning Fund.

See Sansoucy Letter at 2, 3. CAN similarly complains about lack of access to decommissioning documents. See, e.g., CAN’s Petition at 3, 11, 15; CAN’s Reply Brief at 18.

We find below that Cortlandt and CAN have made sufficient showings of standing and have raised admissible issues. We also recognize that the lack of access to the Applicants’ full financial information could affect their ability to present their substantive case at the hearing. E.g., pp. 297, 299, 300, *infra*. Cortlandt and CAN (along with the Association and Westchester, if they wish) should discuss access to proprietary information with the Applicants and thereafter file with the Presiding Officer a mutually agreeable protective order. If the parties cannot agree on a protective order, CAN and Cortlandt may move for issuance of such an order.¹³ Moreover, we note that portions of the hearing (which we herein grant) may have to be closed to the public when issues involving proprietary information are being addressed.

IV. DISCUSSION

To intervene as of right in any Commission licensing proceeding, a petitioner must demonstrate that its ‘‘interest may be affected by the proceeding,’’ i.e., it must demonstrate ‘‘standing.’’ See AEA § 189a, 42 U.S.C. § 2239(a). The Commission’s rules for license transfer proceedings also require that a petition to intervene raise at least one admissible issue. See 10 C.F.R. § 2.1306. For the reasons set forth below, we conclude that CAN, the Association, and Cortlandt have demonstrated standing, and that Westchester is entitled to governmental

¹³ See *GPU Nuclear, Inc.* (Oyster Creek Nuclear Generating Station), CLI-00-6, 51 NRC 193, 211 (2000); *North Atlantic Energy Service Corp.* (Seabrook Station, Unit 1), CLI-99-27, 50 NRC 257, 268 (1999); *North Atlantic Energy Service Corp.* (Seabrook Station, Unit 1), CLI-99-6, 49 NRC 201, 225 (1999); *North Atlantic Energy Service Corp.* (Seabrook Station, Unit 1), unpublished Protective Order of Presiding Officer, 1999 WL 202690 (Mar. 24, 1999). Cf. 10 C.F.R. § 2.740(c)(6).

participant status in this proceeding. We also conclude that CAN, the Association, and Cortlandt have each raised at least one admissible issue. We therefore set the case for hearing.

A. Standing

To demonstrate standing in a Subpart M license transfer proceeding, the petitioner must

- (1) identify an interest in the proceeding by
 - (a) alleging a concrete and particularized injury (actual or threatened) that
 - (b) is fairly traceable to, and may be affected by, the challenged action [e.g., the grant of an application to approve a license transfer], and
 - (c) is likely to be redressed by a favorable decision, and
 - (d) lies arguably within the “zone of interests” protected by the governing statute(s).
- (2) specify the facts pertaining to that interest.

See 10 C.F.R. §§ 2.1306, 2.1308; *Nine Mile Point*, CLI-99-30, 50 NRC at 340-41 & n.5 (and cited authority). Moreover, an organization that seeks representational standing must demonstrate how at least one of its members may be affected by the licensing action, must identify that member by name and address, and must show (preferably by affidavit) that the organization is authorized to request a hearing on behalf of that member. *See Vermont Yankee*, CLI-00-20, 52 NRC at 163; *Oyster Creek*, CLI-00-6, 51 NRC at 202 (and cited authority).

I. CAN

CAN seeks permission to represent the interests of two of its members — Linda Downing, who lives 5½ miles from the FitzPatrick plant, and Marilyn Elie, who lives the same distance from the Indian Point 3 plant. *See* Declaration of Linda Downing, dated July 31, 2000; Declaration of Marilyn Elie, dated July 31, 2000. On Ms. Downing’s and Ms. Elie’s behalf, CAN alleges potential health-and-safety impacts on them if the Commission approves the two license transfers, seeks specific relief to prevent such injuries (disapproval of the transfers or imposition of conditions), and asserts that the safety-related issues fall within the zone of interests protected by the AEA and the National Environmental Policy Act (“NEPA”). *See* CAN’s Petition at 14, 22, 25-26, 28-29, 34, 36, 40-41, 46-47, 50-51, 55-56, 63-64, 65-66; CAN’s Reply Brief at 10-11. We recently granted standing in the *Vermont Yankee*, *Oyster Creek*, and *Monticello* license transfer proceedings to petitioners who (like CAN) raised similar assertions and who (again like CAN) were authorized to represent members living or active

quite close to the site.¹⁴ Based on these similarities, we conclude that CAN has satisfied our standing requirements and is granted standing with respect to both the FitzPatrick and Indian Point 3 license transfers.

2. *The Association*

The Association is a group of about 400 technical and management employees (e.g., reactor operators, reactor engineers) in the nuclear generation component of PASNY.¹⁵ The Association is concerned that the proposed transfer will directly and materially affect (and, in fact, is already affecting) its members' morale and economic interests (salaries, benefits, pensions), as well as their working conditions, professional roles, and safety culture — factors the Association believes will affect performance, attrition, and operational safety at the two plants. The Association also argues that its members' health and safety may suffer as a direct result of the license transfer if an insufficient amount of revenue were to preclude the Entergy companies from adequately funding both occupational radiation protection and safe decommissioning activities. *See* Association's Petition at 17; Association's Reply Brief at 7-8, 25-26. The Association supports its assertions with notarized affirmations of the three individual Petitioners, and it requests both intervenor status and a hearing. As relief, it seeks an order declining to approve the license transfer.

The Association's submission satisfies our standing requirements. Given that we have found that people (like CAN's members here) living or active within a few miles of a nuclear plant have shown standing in license transfer cases, it follows that employees who work *inside* a plant should ordinarily be accorded standing as well, as long as the alleged injury is fairly traceable to the license transfer. Here the Association has made a sufficient linkage to establish standing. The Association's concerns, if substantiated at a hearing, would be redressed by a favorable decision, i.e., a decision declining to approve the transfer.

3. *Local Governmental Entities*

Cortlandt and the Hendrick Hudson School District collectively seek standing in the Indian Point 3 license transfer proceeding on the grounds that the Indian Point 3 plant is located within the boundaries of both governmental entities and that the plant's safe operation and decommissioning is of great concern to

¹⁴ *See Vermont Yankee*, CLI-00-20, 52 NRC at 163-64; *Oyster Creek*, CLI-00-6, 51 NRC at 202-03; *Monticello*, CLI-00-14, 52 NRC at 47.

¹⁵ Messrs. Carano and Pulcher (both cosignatories on the Association's Petition to Intervene and Request for Hearing) are managers at the Indian Point 3 plant; Mr. Wiese (also a cosignatory) is a manager at the FitzPatrick plant. *See* Association's Petition at 2-6.

the safety and long-term economic well-being of the Town and School District communities. We find that, for these reasons, Cortlandt has demonstrated standing with respect to the Indian Point 3 license transfer application. *See Vermont Yankee*, CLI-00-20, 52 NRC at 164. Moreover, Cortlandt is the locus of the Indian Point 3 plant and therefore is in a position analogous to that of an individual living or working within a few miles of a plant whose license may be transferred. *See* discussion of CAN's standing, at pp. 293-94, *supra*.

Westchester, the County where the Indian Point 3 plant is located, seeks participant (but not intervenor) status in this proceeding, citing 10 C.F.R. § 2.715(c). *See* Westchester's Petition, dated July 31, 2000, at 2-3. As we indicated in *Nine Mile Point*, CLI-99-30, 50 NRC at 344, "the Commission has long recognized the benefits of participation in our proceedings by representatives of interested states, counties, municipalities, etc." We therefore grant Westchester's request for participant status regarding the Indian Point 3 license transfer.

B. Admissibility of Issues

To demonstrate that issues are admissible under Subpart M, a petitioner must

- (1) set forth the issues (factual and/or legal) that petitioner seeks to raise,
- (2) demonstrate that those issues fall within the scope of the proceeding,
- (3) demonstrate that those issues are relevant and material to the findings necessary to a grant of the license transfer application,
- (4) show that a genuine dispute exists with the applicant regarding the issues, and
- (5) provide a concise statement of the alleged facts or expert opinions supporting petitioner's position on such issues, together with references to the sources and documents on which petitioner intends to rely.

See 10 C.F.R. § 2.1308; *Nine Mile Point*, CLI-99-30, 50 NRC at 342 (and cited authority). These standards do not allow mere "notice pleading"; the Commission will not accept "the filing of a vague, unparticularized" issue, unsupported by alleged fact or expert opinion and documentary support. *See Seabrook*, CLI-99-6, 49 NRC at 219 (citation and internal quotation marks omitted). General assertions or conclusions will not suffice. This is not to say, however, that our threshold admissibility requirements should be turned into a "fortress to deny intervention." *Cf. Duke Energy Corp.* (Oconee Nuclear Station, Units 1, 2, and 3), CLI-99-11, 49 NRC 328, 335 (1999), quoting *Philadelphia Electric Co.* (Peach Bottom Atomic Power Station, Units 2 and 3), ALAB-216, 8 AEC 13, 21 (1974).

1. General Concerns

We initially touch on two general concerns raised by the Association and CAN. The first is a claimed decline in the educational opportunities and talent necessary

for an effective nuclear workforce in the United States. See Association's Petition at 19-20. The second is an alleged overconcentration in the ownership of nuclear power plants. See CAN's Petition at 12-18. These may well be significant questions warranting Commission inquiry. Indeed, as we recently pointed out in *Vermont Yankee*, the NRC Staff, at Commission direction, already is examining the industry consolidation question. See CLI-00-20, 52 NRC at 172. But an individual license transfer adjudication is not an appropriate forum for a legislative-like inquiry into issues affecting the entire nuclear industry. See *id.* We therefore decline to admit for hearing Petitioners' general issues on a declining nuclear workforce and on overly concentrated ownership.¹⁶

2. *Financial Qualifications Issues*

Cortlandt and CAN question whether Entergy FitzPatrick and Entergy Indian Point will have the necessary level of financial qualifications to run the FitzPatrick and Indian Point 3 plants safely. See Cortlandt's Petition at 5-6; CAN's Petition at 54-55. We admit Cortlandt's issue as discussed below insofar as it argues that Entergy Indian Point's potential joint and several liability for Entergy FitzPatrick's fuel and plant purchase expenses could draw into question the "reasonable assurance" that Entergy Indian Point has "the funds necessary" to operate the Indian Point plant safely. See 10 C.F.R. § 50.33(f)(2). In addition, we give Cortlandt and CAN an opportunity to formulate a challenge to Entergy's cost-and-revenue projections for both plants, after a protective order is entered making Entergy's confidential financial data available. See *generally Seabrook*, CLI-99-6, 49 NRC at 219-21. We turn now, briefly, to Petitioners' specific claims.

a. *Joint and Several Liability*

Cortlandt asserts that several of the agreements underlying the transfer impose liability on Entergy Indian Point for certain financial obligations of Entergy FitzPatrick. See Cortlandt's Petition at 6-8 and Affirmation of Peter Henner ¶¶ 14, both of which refer to a \$586 million Facilities Payment Note (Exh. A to Indian Point Application) and a \$171 million Fuel Payment Note (Exh. B to Indian Point 3 Application). Cortlandt is worried that these joint and several liability

¹⁶ Entergy's acquisition of the Indian Point and FitzPatrick plants, if the proposed deals are consummated, would give the "Entergy family" control over approximately 7.9 nuclear plants. If Entergy then merges with the FPL Group and purchases the Indian Point 2 facility, as has been proposed, the Entergy conglomerate will then control 12.75 nuclear power plants. To place this in perspective, Commonwealth Edison historically (and currently) has held an ownership interest in 12.5 plants. See *Vermont Yankee*, CLI-00-20, 52 NRC at 174 n.20. There are over 100 nuclear power reactor units in the United States. Petitioners have not explained why adding two reactors to Entergy's current fleet, in and of itself, poses a unique health-and-safety risk warranting an adjudicatory hearing.

obligations would place the Indian Point 3 plant in financial jeopardy in the event of an accident at either Indian Point 3 or FitzPatrick.

Such financial jeopardy could, according to Cortlandt, leave the Indian Point plant in an unsafe condition that would place at risk both the environment and the public health. *See* Cortlandt's Petition at 7; Cortlandt's Supplemental Filing at 3; Affirmation of Peter Henner ¶¶ 13, 60. In support, Cortlandt points to the fact that Entergy Indian Point has agreed to sell its entire output of electricity to PASNY for 3.6 cents per kilowatt-hour through 2004 — a revenue level Cortlandt considers sufficient to cover Unit 3's operating costs, but insufficient to simultaneously satisfy any obligations arising from activities at the FitzPatrick plant. *See* Affirmation of Peter Henner ¶ 15. According to Cortlandt, the problem is exacerbated by the Entergy companies' ostensible failure to allocate between the Indian Point 3 and FitzPatrick plants the payment for those plant's combined fuel assets.¹⁷

The Applicants respond only briefly to this general line of argument, stating merely that Cortlandt's assertions of joint and several liability are vague and baseless. *See* Answer to Cortlandt's Petition at 13-14. We disagree with the Applicants.¹⁸ Cortlandt points specifically to two financial obligations (the Facilities Payment Note and the Fuel Payment Note) as sources of joint and several liability and asserts that PASNY's 3.6 cent per kilowatt-hour payments would be insufficient to satisfy the transferees' obligations at both FitzPatrick and Indian Point 3. Moreover, Cortlandt's expert (Mr. Sansoucy) concludes that the estimated net operating income from Indian Point 3 for the next 7 years would, under certain assumptions, be insufficient to cover the facility and fuel payments during that time. *See* Sansoucy Letter at 2. These allegations, backed by an expert's affidavit, create a genuine dispute warranting a hearing.¹⁹

¹⁷ *See* Affirmation of Peter Henner ¶ 17. *See also* Sansoucy Letter at 2 ("[I]t is not possible to render an opinion as to whether the income stream to Entergy will be sufficient to make the required payments. A particular problem is that the fuel payment stream cited in the application is for the combined fuel assets of [Indian Point] 3 and James A. FitzPatrick Nuclear Generating Station and does not allocate the portion of payments assigned to each site [citing Purchase and Sale Agreement at 14].")

¹⁸ We do, however, agree with the Applicants on one point. We see no factual basis (e.g., affidavits or other documents) in the record for Cortlandt's assertion regarding the inadequacy of Entergy's proposed \$50 million letter of credit. *See* Cortlandt's Petition at 7. This aspect of the financial qualifications issue is therefore not admitted for hearing.

¹⁹ *See* *Yankee Atomic Electric Co. (Yankee Nuclear Power Station)*, CLI-96-7, 43 NRC 235, 249 (1996) (citations and internal quotation marks omitted):

Although section 2.714 imposes on a petitioner the burden of going forward with a sufficient factual basis, it does not shift the ultimate burden of proof from the applicant to the petitioner. Nor does section 2.714 require a petitioner to prove its case at the contention stage. For factual disputes, a petitioner need not proffer facts in formal affidavit or evidentiary form, sufficient to withstand a summary disposition motion. On the other hand, a petitioner must present sufficient information to show a genuine dispute and reasonably indicating that a further inquiry is appropriate.

b. Limited Liability Corporation

As a second line of argument regarding financial qualifications, Cortlandt asserts that Entergy Indian Point, as a limited liability company, may not have the necessary resources to protect the environment and meet its legal, contractual, and regulatory obligations to its employees, PASNY (pursuant to the Indian Point 3 and FitzPatrick sales contracts), and those who may be injured or suffer property damage in a nuclear accident. *See* Affirmation of Peter Henner ¶ 25(e). Cortlandt anticipates that Entergy Indian Point could lack the necessary resources to respond to these obligations if it were to face an accident, a shortfall in operating revenue due to fluctuations in the market, or changes in the energy market or in the cost of producing nuclear power. *See* Affirmation of Peter Henner ¶ 54. Cortlandt asserts that the newly formed Entergy Indian Point should be subject to the stricter financial requirements of 10 C.F.R. § 50.33(f)(3) and (4). *See* Affirmation of Peter Henner ¶ 53.

Cortlandt acknowledges that we have issued reactor operating licenses to limited liability corporations in the past and that we have recently approved a transfer of such a license to an LLC whose only asset was the generating facility. *See id.* ¶ 55, citing *Oyster Creek*, CLI-00-6, 51 NRC at 208. However, Cortlandt considers *Oyster Creek* factually distinguishable inasmuch as the transferor in that proceeding was an investor-owned utility while the transferor in the instant proceeding is a public entity. *See* Affirmation of Peter Henner ¶ 59. Cortlandt also considers *Oyster Creek* to have been wrongly decided and argues that it creates a “fortress to deny intervention.” *See id.* ¶ 62.

We decline to admit this issue. The Applicants have already provided the financial data called for by the requirements of 10 C.F.R. § 50.33(f)(3) and (4). Moreover, Cortlandt has offered us no convincing reason to reconsider our legal ruling in *Oyster Creek*,²⁰ and we find equally unconvincing its effort to distinguish that case factually. The issue at bar is the financial qualifications of the *transferee*. Cortlandt has not explained why the public status of the *transferor* is relevant to this issue.

c. Baseline Funding

CAN contends that we should decline to approve the license transfers until Entergy FitzPatrick and Entergy Indian Point, together with their parent corporations, establish “baseline funding” that is clearly defined and substantially increased over the current level. *See* CAN’s Petition at 54. This general line of argument is quite similar (and, in some cases, identical) to an issue raised by CAN in *Vermont Yankee*. As we noted in that decision, CAN “nowhere defines

²⁰We recently reaffirmed our *Oyster Creek* holding. *See Monticello*, CLI-00-14, 52 NRC at 57.

the term [’baseline funding’]; nor is it a term with which we are familiar.’’ See CLI-00-20, 52 NRC at 171. However, from the context of CAN’s references to baseline funding, it appears in the instant proceeding that CAN is referring to the \$90 million line of credit that the Entergy companies are offering as supplemental funding, if necessary. For the reasons set forth below, we find that CAN has failed to provide an adequate basis for most of this issue, but may submit a revised issue regarding one facet of the ‘baseline funding’ question within 20 days of issuance of a protective order that provides CAN access to the Applicants’ proprietary information.

CAN initially argues that the Applicants have failed to explain whether the \$50 million letter of credit from Entergy Global Investments, Inc., is to support all of Entergy’s current nuclear holdings and future acquisitions, and whether those funds are immediately available to Entergy FitzPatrick and Entergy Indian Point or whether instead they are available only upon repayment of a \$50 million letter of credit from Entergy Corp. See CAN’s Petition at 54-55. In response, the Applicants explain that the Entergy Corp.’s \$50 million line of credit is part of the \$90 million supplemental funding that various Entergy companies are making available to meet contingencies for both Entergy FitzPatrick and Entergy Indian Point. The funds, according to the Applicants, are not available to the entire fleet of Entergy reactors. See Answer to CAN’s Petition at 26 n.20. In our view, the Applicants’ explanation fills the informational gap about which CAN complains, leaving no ‘genuine dispute’ on this point. See 10 C.F.R. § 2.1306(b)(2)(iv). We therefore do not admit this portion of CAN’s ‘baseline funding’ issue.²¹

CAN next argues that (a) neither FitzPatrick nor Indian Point 3 has ever met, on a sustained basis, the revenue generation standards required under the Purchase and Sale Agreement; (b) maintenance outage costs could easily exceed the \$90 million in supplemental funding available to the two plants; and therefore (c) the Applicants must provide additional assurance as to the health and safety of both the workers and the public. See CAN’s Petition at 55. Applicants respond that CAN has provided no affidavits, supporting documents, or other evidence to support this claim. See Answer to CAN’s Petition at 26. However, CAN explains that the Applicants’ exclusion of certain financial information from the two applications precludes CAN from comparing the anticipated operating costs with the anticipated revenues and thereby assessing the transferees’ ability to plan for maintenance outages or to build up sufficient funds for unexpected outages. See CAN’s Reply Brief at 18.

Regarding part (b) of this argument, the ‘sufficiency’ *vel non* of the \$90 million supplemental funding does not constitute grounds for a hearing. In

²¹ Entergy Global Investments, Inc., has offered two \$20 million lines of credit to Entergy FitzPatrick and Entergy Indian Point, respectively. However, contrary to CAN’s representations, it has not issued a \$50 million dollar letter of credit.

Vermont Yankee, we recently declined to admit essentially the same issue (also raised by CAN) on the ground that NRC rules do not mandate supplemental funding. “The parent company guarantee is supplemental information and not material to the financial qualifications determination under 10 C.F.R. § 50.33(f)(2).”²² CAN has given us no reason to reach a different conclusion in the instant proceeding.

Regarding the remainder of CAN’s argument, however, we reach a somewhat different conclusion. CAN’s claim of revenue shortfalls essentially challenges the Entergy companies’ cost and revenue projections — precisely the kind of challenge we have indicated would be acceptable if based on sufficient facts, expert opinion, or documentary support. *See Oyster Creek*, CLI-00-6, 51 NRC at 207, 208, citing *Seabrook*, CLI-99-6, 49 NRC at 219-21. In fact, we have already ruled that Cortlandt’s somewhat different financial qualifications issue meets our threshold requirements for a hearing. It is true that CAN’s version of the issue appears only in its petition, without backup support. However, we believe that CAN’s explanation regarding the unavailability of relevant data entitles it to gain access to the data through a protective order (*see* p. 292, *supra*) before being held to our usual specificity requirements.²³ The same is true of Cortlandt insofar as it also chooses to challenge Entergy’s cost-and-revenue projections. We therefore authorize CAN and Cortlandt to submit a properly formulated and supported financial qualifications issue within 20 days of the entry of a protective order.

We caution CAN, and Cortlandt as well, that “absolute certainty” in financial forecasts is impossible, and that we do not require it. *See Seabrook*, CLI-99-6, 49 NRC at 221-22. Challenges to Entergy’s financial qualifications “ultimately will prevail only if [they] can demonstrate relevant uncertainties significantly greater than those that usually cloud business outlooks.” *Id.* at 222.

Finally, CAN asserts that Entergy’s supplemental \$90 million will prove inadequate to cover Entergy’s various potential liabilities, including its Price-Anderson Act responsibility. We have already explained why the \$90 million in supplemental funds is not part of this license transfer case. And, in our recent *Vermont Yankee* decision, we rejected an identical Price-Anderson claim by CAN:

²² *See* CLI-00-20, 52 NRC at 175, citing *Oyster Creek*, CLI-00-6, 51 NRC at 205. *See also Vermont Yankee*, CLI-00-20, 52 NRC at 178:

[A]lthough AmerGen’s \$200 million reserve fund provides significant assurance of sufficient operating and decommissioning funds in the event of a problem, the fund is not[, strictly speaking,] required by our rules. It therefore lies outside the bounds of our license transfer hearing process — which focuses on whether AmerGen Vermont meets the required financial and technical qualifications.

²³ Subpart M calls for “specificity” in pleadings. *See Northeast Nuclear Energy Co.* (Millstone Nuclear Power Station, Units 1, 2, and 3), CLI-00-18, 52 NRC 129, 131-32 (2000). However, in the unusual setting here, where critical information has been submitted to the NRC under a claim of confidentiality and was not available to Petitioners when framing their issues, it is appropriate to defer ruling on the admissibility of an issue until the petitioner has had an opportunity to review this information and submit a properly documented issue.

[N]othing about Price-Anderson coverage changes as a result of this license transfer. The same coverage will exist after license transfer as exists today. Moreover, contrary to what CAN suggests, Price-Anderson indemnification agreements continue in effect even after plants have ceased permanent operation and are engaged in decommissioning. *See* 10 C.F.R. § 140.92 (NRC Indemnification Agreement, art. VII); 10 C.F.R. § 50.54(w). Thus, CAN's Price-Anderson argument is ill-conceived²⁴

In sum, we will consider a revised issue submitted by CAN regarding the Applicants' cost-and-revenue projections, but we reject CAN's claims regarding the \$90 million supplemental fund and the Price-Anderson Act.

3. Decommissioning Issues

a. Consistency of Decommissioning Funding Arrangement with 10 C.F.R. § 50.75

As explained at p. 287, *supra*, the Applicants have structured an unusual arrangement whereby the transferor (PASNY) keeps the decommissioning fund after transferring the FitzPatrick and Indian Point 3 plants to the Entergy companies. Ordinarily, a transferee would receive the decommissioning fund along with the nuclear plant with which it was associated.

The Association raises the question whether the Applicants' arrangement is consistent with the Commission's own decommissioning requirements of 10 C.F.R. § 50.75(e) which, according to the Association, requires the transferee (here, the Entergy companies) to hold the decommissioning funds. *See* Association's Petition at 18; Affidavit of Stephen Prussman. The Association disputes Applicants' claim that the license transfer request meets the requirements of 10 C.F.R. § 50.75(e)(1)(vi), i.e., that the applicant provide financial assurance "equivalent" to that offered by the decommissioning devices (e.g., a surety or insurance arrangement) specified in the earlier portions of section 50.75(e)(1). In support, the Association asserts that outstanding questions of tax liability limit the availability of the decommissioning funds and also that the Applicants impose various contractual limitations upon the availability of the funds (i.e., limits based upon plants owned, limits on the Authority's liability, and provisions to pay less than the full decommissioning funding). *See* Prussman Affidavit

²⁴CLI-00-20, 52 NRC at 175. In that same decision, we further commented on the analogous Price-Anderson argument of another petitioner (Vermont) that "our regulations only require it to show that it has sufficient cash equivalents (such as the parent company guarantee) to cover the retroactive \$10 million premium required by our regulations at 10 C.F.R. § 140.21(e)-(f). *See Oyster Creek*, CLI-00-6, 51 NRC at 206. . . . Vermont's argument that the Applicant must meet financial requirements in addition to those imposed by our regulations constitutes," in effect, a demand for additional rules, but it does not provide an adequate basis for a hearing. "Moreover, . . . prior to issuance of the amended license [to] AmerGen Vermont, [it] must obtain all regulatorily required property damage insurance." CLI-00-20, 52 NRC at 178; CLI-00-6, 51 NRC at 206.

at 2. The Association also asserts that the arrangement contravenes 10 C.F.R. § 50.75(e)(1)(v), which specifies that the terms of the contract must be with the licensee's customers and include provisions that the electricity buyers will pay for decommissioning. *See* Prussman Affidavit at 2.

At bottom, the issue here is whether the Applicants' financial assurance arrangement is lawful under 10 C.F.R. § 50.75 and the "equivalent" of those otherwise prescribed in the regulations (10 C.F.R. § 50.75(e)(1)(i)-(v)). The issue raises genuine disputes of law and fact and we admit it for hearing.²⁵ We now move to the remaining decommissioning issues. None of these is admissible.

b. Commitment and Ability To Decommission Indian Point 3 to Greenfield Condition

Cortlandt's first substantive issue regarding decommissioning funding is whether the Entergy companies are both committed and financially able to decommission the Indian Point 3 facility to "greenfield" condition²⁶ and thereby give Cortlandt the benefits of the greenfield decommissioning of not only Unit 3 but also Units 1 and 2 (whose decommissioning awaits the decommissioning of Unit 3).²⁷

Concerning the Entergy companies' commitment, Cortlandt maintains that the transfer documents do not commit Entergy Indian Point to greenfield decommissioning, even though the planning for greenfield decommissioning must begin soon if it is to be achieved.²⁸ Cortlandt does not trust Entergy Indian Point, as a for-profit entity, to spend more than the minimum amount possible to decommission the facility, even if this means decommissioning it to less than greenfield conditions.²⁹

²⁵ CAN raises related issues: whether NRC approval of the transfers will deprive the Commission of authority to require PASNY to conduct remediation under decommissioning, and whether, under those circumstances, PASNY would no longer have access to the decommissioning trust fund for the remediation it would need to complete. *See* CAN's Reply Brief at 14. These issues relate to the admitted issue involving 10 C.F.R. § 50.75, *supra*, and CAN may address them at the hearing in that context.

CAN and the Association should be aware, however, that the decommissioning trust agreement has been modified somewhat by the NRC Staff's November 9, 2000 orders. *See* both Staff Orders at 6 ¶ 9.

²⁶ *See* Cortlandt's Petition at 8; Cortlandt's Supplemental Filing at 2; Affirmation of Peter Henner ¶¶ 9, 26(a), 31-32, 35-36, 52, 61; Sansoucy Letter at 4. Cortlandt is particularly concerned about whether the transferees have the financial ability to remove permanently the spent fuel rods from the site upon decommissioning, without using dry cask storage. *See* Affirmation of Peter Henner ¶ 12; Sansoucy Letter at 3; Cortlandt Verified Petition at 16. PASNY estimates that the fund for decommissioning both the FitzPatrick and Indian Point 3 plants will contain \$1.9 billion at the time of license expiration. *See* Cortlandt Verified Petition at 11.

²⁷ *See* Affirmation of Peter Henner ¶ 7. Although it is less than clear, Cortlandt appears to argue that the full decommissioning of Indian Point Unit 1 was postponed to coincide with the decommissioning of Units 2 and 3. *See id.* ¶¶ 43-46; Cortlandt's Reply Brief at 14. Units 1 and 2 are not owned by PASNY and are not the subject of this proceeding.

²⁸ *See* Affirmation of Peter Henner ¶ 35.

²⁹ *See id.* ¶¶ 36, 41; Cortlandt Verified Petition at 11.

Concerning the Entergy companies' ability to fund decommissioning, Cortlandt questions the adequacy of the decommissioning fund in light of Entergy Indian Point's joint and several liability for Entergy FitzPatrick's obligations.³⁰ It also challenges the Applicants' reliance on the decommissioning cost estimate established in the NRC's regulations, arguing that the actual costs may be higher than the regulations envision.³¹ Cortlandt objects that the Applicants have not made enough information available for Cortlandt to determine the sufficiency of the decommissioning fund.³² Cortlandt explains that "greenfielding" is particularly important to it because the plant property is a prime area for either residential/commercial development or recreational use.³³

The principal difficulty Cortlandt faces with this issue is that our regulations do not require Entergy Indian Point to decommission the plant to greenfield condition. Although Cortlandt may have grounds for an action in a State Court against PASNY for breach of a contractual commitment to return the facility land to greenfield condition,³⁴ Cortlandt has provided no basis for us to question Entergy Indian Point's ability or willingness to comply with the NRC's decommissioning requirements.

Cortlandt's argument has other flaws as well. Its challenge to the Applicants' use of the very decommissioning cost estimate methodology sanctioned by our rules amounts to an impermissible collateral attack on 10 C.F.R. § 50.75.³⁵ Cortlandt has not attempted to justify a waiver here of our rule prohibiting such attacks. *See* 10 C.F.R. § 2.1329. Notably, the fund's current assets *exceed* regulatory requirements.³⁶ Finally, the decommissioning funds are held in a special fund, separate and apart from Entergy Indian Point's other assets, and are therefore unaffected by any joint and several liability that Entergy Indian Point may have for the obligations of Entergy FitzPatrick.

³⁰ *See* Cortlandt's Reply Brief at 11.

³¹ *See id.* at 11-12.

³² *See* Cortlandt's Petition at 8; Cortlandt's Supplemental Filing at 3.

³³ *See* Affirmation of Peter Henner ¶ 33; Cortlandt Verified Petition at 10.

³⁴ *See* note 6, *supra*. Cortlandt refers to a "social compact" between Cortlandt and PASNY. According to Cortlandt, PASNY agreed in this compact to decommission Indian Point Units 1, 2, and 3 to greenfield condition in return for Cortlandt agreeing to permit the siting of Indian Point 3 at its current location. *See* Cortlandt's Reply Brief at 10-11. Similarly, Cortlandt asserts that "[t]he monies in the decommissioning fund were contributed based on [PASNY's] commitment to the surrounding community, including [Cortlandt], to restore the site to greenfield conditions." Cortlandt asserts that the Applicants cannot legitimately argue that greenfielding is beyond the scope of the transfer proceeding yet, at the same time, transfer the money that was placed in the decommissioning fund on the understanding that it would be used to "greenfield" the site. *See id.* at 15.

³⁵ *See Vermont Yankee*, CLI-00-20, 52 NRC at 165-66. CAN also challenges Entergy's use of our generic decommissioning cost formula. *See* CAN's Petition at 18-23; CAN's Reply Brief at 12-13. For the reasons we gave in *Vermont Yankee*, 52 NRC at 165-66, we find CAN's claim inadmissible.

³⁶ As we indicated in *Seabrook*, CLI-99-6, 49 NRC at 218 n.9, power reactor licensees will occasionally set aside more funds than the NRC requires — generally to cover activities such as the removal and subsequent disposal of spent fuel or nonradioactive structures and materials beyond the level necessary to reduce residual radioactivity to the levels required under our regulations. Moreover, other governmental agencies, such as the FERC and state public utilities commissions, may also impose funding requirements that licensees may have to satisfy, over and above those of the NRC.

For the reasons set forth above, this issue is not admissible.

c. Extension or Renewal of Indian Point 3 License

Cortlandt's next substantive issue is whether the Entergy companies would seek to extend or renew the Indian Point 3 operating license (which expires in 2015)³⁷ and thereby delay Cortlandt's enjoyment of the full panoply of health-and-safety benefits associated with the expected decommissioning of all three units.³⁸ Specifically, Cortlandt refers to its expectations that PASNY would dismantle and move the facility (i.e., Unit 3) off site and that any onsite storage of spent fuel by PASNY would be of limited duration.³⁹ Cortlandt claims that any delay in decommissioning Unit 3 (and any consequent postponement of the decommissioning of Units 1 and 2) will adversely affect Cortlandt's health-and-safety interests⁴⁰ by subjecting Cortlandt and its citizens to the possibility of increased radiological exposure as a result of both the continued operation of the plant and the continued (and possibly expanded) onsite storage of spent fuel.⁴¹ By contrast, Cortlandt expects Entergy Indian Point, as a for-profit entity, to run the plant as long as possible, in order to continue generating revenue.⁴² For this reason, Cortlandt asserts that, with the time for decommissioning planning so near, the NRC Staff's assessment of financial ability must not be truncated, but should instead include an evaluation of the transferees' ability to decommission Indian Point 3 — both as currently licensed and as that license may be renewed or extended.⁴³

These concerns do not fall within the scope of this license transfer proceeding. Entergy Indian Point does not here seek in its application to renew or extend the Indian Point 3 operating license, nor does its pending application assume such a request. Moreover, a request to renew or extend the license would seem

³⁷ See Affirmation of Peter Henner ¶ 3. Cortlandt explains that certain other Entergy companies are already in the process of renewing the licenses of other nuclear plants (e.g., Arkansas One), thereby purportedly increasing the likelihood that Entergy Indian Point would likewise seek to renew the Indian Point 3 license. See *id.* ¶ 25(b).

Along similar lines, Cortlandt also asks the Commission to consider the impact of the proposed transfers on possible requests for extensions and/or renewals of the licenses for Unit 2 at Indian Point. See Cortlandt's Petition at 8-9; Cortlandt's Supplemental Filing at 2, 4. Cortlandt explains that the operating license for this unit expires in 2013. See Affirmation of Peter Henner ¶ 3. According to Cortlandt, the instant license transfer application will affect whether and by whom a future application for license renewal is ultimately made. See *id.* ¶ 39.

³⁸ See *id.* ¶¶ 6, 7, 11, 44; Cortlandt's Supplemental Filing at 3; Cortlandt's Reply Brief at 12-14. Cortlandt explains that Indian Point Unit 1 has not been an operating facility since 1974 but has yet to be fully decommissioned (see Affirmation of Peter Henner ¶ 3) and claims that Consolidated Edison Inc. of New York ("ConEd," the owner of Indian Point Units 1 and 2) has committed to decommission its units for unrestricted use at the same time as PASNY decommissions Unit 3 for unrestricted use. See Cortlandt's Petition at 8-9; Cortlandt's Supplemental Filing at 2, 4.

³⁹ See Cortlandt's Petition at 5; Cortlandt's Supplemental Filing, at 4; Cortlandt Verified Petition at 16.

⁴⁰ See Affirmation of Peter Henner ¶ 11.

⁴¹ See *id.* ¶¶ 25(b), 34; Cortlandt Verified Petition at 16.

⁴² See Affirmation of Peter Henner ¶¶ 36, 40; Cortlandt Verified Petition at 11.

⁴³ See Affirmation of Peter Henner ¶ 6; Cortlandt's Reply Brief at 12-14.

just as likely from PASNY as from Entergy Indian Point, assuming the plant remains profitable. Finally, in posing this issue, Cortlandt overlooks its right to seek intervenor status in any application for license renewal or license extension that Entergy Indian Point may file. These grounds for rejection apply equally to Cortlandt's concerns regarding delayed decommissioning of the three units, the resulting need both to store additional spent fuel on site during the plant's extended life and the resulting need to continue the storage of current spent fuel for a longer time than Cortlandt had anticipated.⁴⁴

In a related vein, Cortlandt expresses concern that the Indian Point 3 facility will be used as a temporary repository for spent fuel from other nuclear facilities owned by the Entergy family of companies.⁴⁵ This is pure speculation. The transfer application does not seek such authority, and the Indian Point 3 facility could not accept spent fuel from other facilities without transshipment license authority. Should Entergy ever seek such authority, Cortlandt would have the right to seek intervenor status.

d. Management of Indian Point 3 Decommissioning Fund

Cortlandt next questions whether sufficient controls exist regarding the management of the decommissioning fund.⁴⁶ It suggests that the decommissioning agreements contain ill-defined and uncertain liabilities for the public, and expresses concern that any such additional liabilities or costs incurred by PASNY will have to be absorbed either by PASNY customers or the New York taxpayers.⁴⁷ Also, Cortlandt (through its expert, Mr. Sansoucy) claims that PASNY may be retaining decommissioning funds in excess of the amount required and that the application is silent as to the distribution of any excess money remaining after decommissioning.⁴⁸

With the exception of Mr. Sansoucy's assertion concerning excess funds, the issue is overly vague. Cortlandt nowhere identifies the liabilities about which it is concerned. Nor does it explain why it believes they would fall on the public's shoulders. Mr. Sansoucy's claim, while sufficiently specific, lies beyond the scope of this proceeding. The Commission does not have statutory authority to determine the recipient of excess decommissioning funds. For these reasons, we decline to admit this issue.⁴⁹

⁴⁴ See Cortlandt's Petition at 5; Cortlandt's Supplemental Filing at 4; Affirmation of Peter Henner ¶¶ 11-13, 61; Sansoucy Letter at 3; Cortlandt Verified Petition at 16; Cortlandt's Reply Brief at 12, 14.

⁴⁵ See Affirmation of Peter Henner ¶ 25(c); Cortlandt Verified Petition at 16.

⁴⁶ See Cortlandt's Petition at 8.

⁴⁷ See *id.* at 9.

⁴⁸ See Sansoucy Letter at 3.

⁴⁹ To the extent that Mr. Sansoucy intended here to argue that such retention of decommissioning funds was a way of making a profit off of the fund, we address that issue at p. 306, *infra*.

e. Scope of Commission's Consideration of Indian Point 3 Decommissioning Issues To Include Indian Point 2 Matters

In addition to raising these substantive issues regarding decommissioning funding, Cortlandt requests that the Commission consider the transfer in light of both the fact that Units 2 and 3 share common facilities and the possibility that Entergy Indian Point (or one of its affiliates) may acquire Indian Point Unit 2 — a possibility that Cortlandt states is specifically contemplated in the Indian Point 3 transfer agreements.⁵⁰ We decline to expand the scope of this proceeding in the two ways that Cortlandt requests. Cortlandt has not explained how either the commonality of facilities or Entergy's possible purchase of Unit 2 bears on the acceptability of the Indian Point 3 transfer.

f. Entergy's Intention To Make a Profit on the Decommissioning Fund

CAN objects to Entergy's espoused intent to make a profit on the decommissioning trust funds and to return that profit to its shareholders. To accomplish this, Entergy would, according to CAN, have to cut corners and thereby risk public health and safety. *See* CAN's Petition at 21. CAN believes that Entergy will try to turn a profit by minimizing the onsite remediation by constructing new power plants on the decommissioning sites and rotating the decommissioning work schedules at simultaneously decommissioning facilities. *See id.* at 21, 22.

In support, CAN refers us to page 23 of Entergy's 1999 Annual Report.⁵¹ We have checked the cited page on Entergy's Web page and find no such statement. Although page 24 of the Annual Report does contain a reference to "manag[ing] decommissioning of nuclear plants . . . as a source of earnings," the reference is made in the context of Entergy's contracts to decommission plants owned by *other* entities. We conclude that CAN has provided no basis for this issue, and we decline to admit it.

g. Lack of Provision for Offsite Remediation

CAN asserts that, despite both plants having an incontestible record of offsite releases of hazardous radioactive and nonradioactive material, neither the Decommissioning Cost Estimates, the Purchase and Sale Agreement, nor the

⁵⁰ *See* Affirmation of Peter Henner ¶¶ 8, 42, 46; Cortlandt's Reply Brief at 14. In fact, Entergy recently announced that it had contracted to purchase from ConEd both Indian Point Units 1 and 2. *See Entergy to Purchase 2 Nuclear Power Plants in New York State*, Wall Street Journal, Nov. 10, 2000, at A-6.

⁵¹ CAN's Petition at 21 & n.22. However, CAN provides us a copy of neither the report nor the cited page. Even after Entergy denied ever expressing such an intent (Answer to CAN's Petition at 13 n.9), CAN in its Reply Brief still failed to support its claim with the necessary documentation.

License Transfer Applications contain a provision addressing offsite remediation. *See* CAN's Petition at 20, 23-26. In support, CAN points specifically to section 2.4(b) of the Purchase and Sale Agreement, which provides that Entergy will not assume decommissioning responsibility for the remediation of offsite contamination occurring during PASNY's ownership of the plants. Although CAN acknowledges that it may be unfair to hold Entergy accountable for contamination occurring under PASNY's ownership, it points out that the Purchase and Sales Agreement contains no provision holding PASNY liable for that contamination. CAN is concerned that an NRC approval of the transfer could absolve both Entergy and PASNY of such responsibility. *See* CAN's Petition at 23-24.

To resolve this problem, CAN proposes that the Commission impose one of the following two conditions on the transfer:

“Through the Environmental Impact Statement requested [elsewhere in CAN's Petition, the NRC Staff should] establish an accurate and detailed study of [the offsite] contamination . . . which PASNY must remediate before the license can be transferred.”

or

PASNY “should not simply be released from all licensee responsibility, but rather issued a ‘decommissioning’ license until [PASNY] has completed” whatever remediation for which Entergy is not assuming responsibility.

See id. at 24. If the Commission imposes either of these conditions, CAN requests that it also address how to fund this partial remediation. CAN is concerned that PASNY's accountability for partial site remediation and cleanup not compromise the quantity of funds available to complete the decommissioning after the license expires. *See id.* CAN also provides a third alternative condition:

The Commission disregard “clause 2.4(b) . . . insofar as [it affects] decommissioning responsibilities . . . , and Entergy should be required to conduct a complete . . . decommissioning without regard to whether the off-site contamination was caused by [PASNY] or Entergy, but [with] Entergy . . . allowed to recover those [actual] costs from [PASNY that] . . . exceed the amount in the Decommissioning Trust.”

See id. at 24-25.

Applicants respond that nothing in the Purchase and Sales Agreement relieves PASNY of any liabilities not assumed by the Entergy Applicants, and that PASNY “retains liability for off-site disposal, storage, etc. that occurred prior to closing.” *See* Answer to CAN's Petition at 14. Our review of the agreement gives us no reason to question the Applicants' interpretation. We therefore see no reason to impose the conditions CAN has requested. Moreover, we see no basis for CAN's concern that this retained liability will somehow deplete the FitzPatrick and Indian Point 3 decommissioning trust funds. Those funds are set aside in a trust specifically and exclusively dedicated to the purpose of decommissioning

the plant sites; the trust cannot be used for offsite remediation.⁵² In short, we see nothing in CAN's offsite remediation argument that raises a material issue of fact or law meriting a hearing.

h. Environmental Impact Statements

CAN requests the Commission to prepare environmental impact statements ("EIS") regarding the adequacy of the decommissioning funding. *See* CAN's Petition at 26-27. CAN later refines this request to cover only the levels of on- and offsite contamination. *See* CAN's Reply Brief at 18. CAN points out that, prior to 1980, plants throughout the United States buried radioactive waste both on and off site, with poor documentation and few safeguards. CAN would like the Commission to prepare EIS's for the two plants to determine the extent of contamination and to set realistic funding requirements. CAN points to the experimental nature of decommissioning and to the decommissioning cost overruns at every decommissioned plant to date. *See* CAN's Petition at 26-27. CAN doubts Entergy's claim that, with experience, it can decrease its decommissioning costs by developing special techniques. CAN also doubts that Entergy will have garnered that experience by the time it needs to decommission both Indian Point 3 and FitzPatrick starting in 2013 and 2015, respectively.⁵³ CAN further asserts that the Entergy companies' inability to recoup their decommissioning expenses from ratepayers constitutes yet another obstacle to successful decommissioning. *See id.* at 28. We decline to admit this issue for the same reasons set forth in our recent decision in *Vermont Yankee*:

CAN's "NEPA" issue amounts to another effort to litigate site-specific decommissioning cost estimates. CAN's position rests on the assumption that our regulations require AmerGen Vermont, in its license transfer application, to provide an estimate of the actual decommissioning and site cleanup costs. As explained in the previous section of this Order, our regulations impose no such requirement. Our decommissioning funding regulation (10 C.F.R. § 50.75(c)) generically establishes the amount of decommissioning funds that must be

⁵² Decommissioning trusts are reserved for decommissioning as defined in 10 C.F.R. § 50.2. Thus, offsite remediation would not be an accepted expense. However, some licensees use the decommissioning trust to accumulate funds for both "decommissioning" as NRC defines it and decommissioning in the broader sense that includes interim spent fuel management, nonradioactive structure demolition, and site remediation to greenfield status. The Commission accepts this approach as long as the NRC-defined "decommissioning" funds are clearly earmarked. Also, once the funds are in the decommissioning trust, withdrawals are limited by 10 C.F.R. § 50.82, so that non-"decommissioning" funds (again, as defined by the NRC) could only be spent after the NRC-defined "decommissioning" work had been finished or committed.

⁵³ *See* CAN's Petition at 27-28. The FitzPatrick license actually expires in 2014.

set aside.⁹ As noted above, the NRC's decommissioning funding rule reflects a deliberate decision not to require site-specific estimates in setting decommissioning funding levels. CAN has not sought a waiver of that rule in this proceeding. *See* 10 C.F.R. § 2.1329 . . . ; *Seabrook*, CLI-99-6, 49 NRC at 217 n.8. Nor has CAN reconciled its demand for a NEPA review with our rules' "categorical exclusion" of license transfers from NEPA requirements. *See* 10 C.F.R. § 51.22(c)(21).

⁹CAN's supporting argument that decommissioning technology is still in an experimental stage fails for the same reason, i.e., it is a collateral attack on 10 C.F.R. § 50.75(c) establishing the amount of decommissioning funds that must be set aside. It is worth noting that the NRC rule that CAN attacks, 10 C.F.R. § 50.75(c), is in fact supported by a generic environmental impact statement. *See* Generic Environmental Impact Statement, NUREG-0586 (August 1988) (issued in conjunction with the promulgation of 10 C.F.R. §§ 50.75 and 50.82). *See generally* Final Rule, "General Requirements for Decommissioning Nuclear Facilities," 53 Fed. Reg. 24,018, 24,051 (June 27, 1988).⁵⁴

CAN also seeks an EIS on two grounds unrelated to decommissioning: that the problems at Indian Point 3 that persuaded Entergy to pass up an opportunity to become the plant's operator in 1996 still exist (*see* CAN's Petition at 48-51), and that the Commission's failure to conduct an antitrust review constitutes a major federal action affecting the quality of the environment (*see id.* at 61). CAN later broadens the first of these so as to seek an EIS on the new owners' operation of both plants. *See* CAN's Reply Brief at 17-18. We reject these two EIS issues on the same grounds as set forth immediately above. In addition, we exclude the first EIS issue (as broadened) on the ground that the scope of this proceeding does not include the new owners' operation of the plants — but includes only the transfer of their operating licenses. Further, we exclude the antitrust EIS issue on same ground we used to reject CAN's same argument in *Vermont Yankee*.⁵⁵

4. CAN's Non-Labor-Related Technical Qualifications Issues

CAN raises an array of challenges to the technical qualifications of the workforce that will be employed at FitzPatrick and Indian Point 3 once the Entergy companies take over those plants. CAN's claims, however, are not directly linked to the license transfers at issue here, but rest largely on current operational issues at the two plants and on Entergy's operation of other plants, including nonnuclear plants. As in our recent *Vermont Yankee* and *Oyster Creek* decisions, where we rejected claims all but identical to CAN's, we find here that CAN has provided no documents, facts, or expert opinion establishing a genuine

⁵⁴CLI-00-20, 52 NRC at 167 (final footnote omitted). *See also* *Monticello*, CLI-00-14, 52 NRC at 59.

⁵⁵CLI-00-20, 52 NRC at 167-68 (footnote omitted):

The fact that a particular license transfer may have antitrust implications does not remove it from the categorical exclusion. In any event, because the AEA does not require, and arguably does not even allow, the Commission to conduct antitrust evaluations of license transfer applications, our purported "failure" to conduct such an evaluation cannot constitute a federal action warranting a NEPA review.

issue concerning technical qualifications. *See also Millstone*, CLI-00-18, 52 NRC at 131-32, *citing* 10 C.F.R. § 2.1306(b)(2)(iii).

a. Age-Related Defects at Both Plants

CAN asserts that the Entergy companies lack the ability to manage FitzPatrick (a boiling-water reactor or “BWR”) and Indian Point 3 (a pressurized-water reactor or “PWR”). CAN claims that FitzPatrick is older and subject to more age-related degradation than Entergy’s other BWRs. *See* CAN’s Petition at 29-36. CAN concludes that Entergy is significantly overstating its claim of experience in maintaining and operating BWRs and that Entergy’s spotty record in managing PWRs (such as Indian Point 3) suggests the company’s ability to manage an increasing number of aging reactors may be stretched past the breaking point. *See id.* at 29-30. Based on these arguments, CAN asks the Commission to “take into consideration the effect of consolidating a large number of aging, mismanaged and otherwise troubled facilities under a single corporate umbrella, especially given the rigors of operating those facilities in a deregulated electricity market without the flexibility of returning to ratepayers to reimburse unexpected operating and maintenance costs.” *See id.* at 30.

CAN ignores Entergy Nuclear Operations’ stated intent to employ the same personnel as are currently working at the two plants. Nor does CAN’s petition challenge these individuals’ technical qualifications. Its discussion of Entergy’s experience in operating other BWRs and PWRs and the age of other Entergy plants does not bear on the technical qualifications of the transferees and their intended employees at FitzPatrick and Indian Point 3. *See Vermont Yankee*, CLI-00-20, 52 NRC at 168-69 (declining to admit a similar issue where CAN failed to challenge the technical qualifications of the plant’s intended employees). We therefore decline to admit this issue.

b. Leak Detection Problems at Both Plants

CAN points to alleged leak detection problems at the two plants and asks the Commission to require Entergy to modify inspections and leak detection equipment and to institute programs to study the rate of crack propagation. CAN further asks the Commission to oversee the development of systems and procedures necessary to provide an objective review of these actions. *See* CAN’s Petition at 32-33. Moreover, CAN asks the Commission to deny the license transfer application on the ground that Entergy, with a tightly packed maintenance schedule and a depleted workforce (due to “profitability” cuts), lacks the flexibility necessary to react quickly to surprises at two or more generating plants. *See id.* at 33. In a similar technical challenge to the two applications, CAN points

to certain evidence that the Updated Final Safety Analysis Reports (“UFSAR”) for both plants have not been kept up to date, and argues that it would be premature to approve a transfer of licenses for reactors that were in an unanalyzed condition. *See id.* at 34-36.

We recently addressed a quite similar argument from CAN in *Vermont Yankee* concerning another company’s ability to discern cracks and leaks. We consider our response there equally dispositive of CAN’s contention in this proceeding:

These arguments address the adequacy of the plant’s ongoing safety-related programs. Operational issues of this kind will remain the same whether or not the license is transferred. The Commission has indicated that a license transfer hearing is not the proper forum in which to conduct a full-scale health-and-safety review of a plant.¹⁴

¹⁴“A license transfer proceeding is not a forum for a full review of all aspects of current plant operation.” *See Oyster Creek*, CLI-00-6, 51 NRC at 213, 214. . . . CAN may, of course, file a petition for Staff enforcement action pursuant to 10 C.F.R. § 2.206 if it is concerned about current safety issues at Vermont Yankee.

See Vermont Yankee, CLI-00-20, 52 NRC at 169. Moreover, in *Vermont Yankee*, we rejected a similar request from CAN (that the Commission require special training as a condition for its approval of the transfer) on the ground that CAN “failed to demonstrate that a genuine dispute exists, with requisite specificity, on this basis.” *See id.* *See also* 10 C.F.R. § 2.1306(b)(2)(iv). This ruling applies equally to CAN’s similar argument here.⁵⁶

c. Issues of Management “Character”

CAN asserts that Entergy’s license transfer applications rely on the resources and experience of the parent company (Entergy Corp.), its public utility subsidiaries (Entergy Arkansas Inc., Entergy Gulf States Inc., Entergy Louisiana Inc., and System Energy Resources Inc.), and its operations subsidiary (Entergy Operations Inc.) to establish a track record as a nuclear operator. CAN describes the operating records of these affiliates as “mixed at best, irrelevant in some regards, and alarming in many others.” *See* CAN’s Petition at 37. CAN further argues that, because the majority of Entergy Nuclear Operations’, Entergy FitzPatrick’s, and Entergy Indian Point’s corporate officers hold positions in other Entergy companies, these two new companies will inevitably inherit the

⁵⁶CAN indicated, for the first time in its Reply Brief, that it was raising the cracks-and-leaks and UFSAR arguments not only as technical and administrative problems meriting the Commission’s attention and correction, but also as an indication of the lack of technical qualifications of the existing plants’ staff, on whose technical qualifications Entergy Nuclear Operations is relying in the applications. *See* CAN’s Reply Brief at 16. CAN’s effort to recast its claim is unavailing. As indicated in *Vermont Yankee* (quoted in the text immediately above), any ongoing operational deficiencies at nuclear plants subject to a license transfer must be addressed regardless of the transfer.

existing companies' record and operational style. *See id.*; CAN's Reply Brief at 16. According to CAN, this record and style are reflected in the facts that Entergy has among the highest number of NRC violations in the United States and that the company's improved capacity factors are "shadowed by questionable maintenance practices and inadequate procedures, work performance, and operator training." *See* CAN's Petition at 38. CAN relies not only on Entergy's record as a nuclear generator; it also points to findings that, in the electrical transmission and delivery business, Entergy has a record of marginalizing safe operations by chronically postponing maintenance and reducing the skilled workforce to levels that compromise worker and public safety. *See* CAN's Petition at 38-40, citing findings of the Texas Public Utility Commission ("Texas PUC") and the Council of the City of New Orleans, both in 1998.⁵⁷

Absent strong support for a claim that difficulties at other plants run by a corporate parent will affect the plant(s) at issue before the Commission, we are unwilling to use our hearing process as a forum for a wide-ranging inquiry into the corporate parent's general activities across the country. Here, CAN's various references to problems of other Entergy subsidiaries, including the nonnuclear subsidiaries, tell us little if anything about Entergy Nuclear Operations' technical qualifications to operate FitzPatrick and Indian Point 3 using the same workforce that is already there. *See Vermont Yankee*, CLI-00-20, 52 NRC at 170 (concluding that "claims of staffing deficiencies at *other* nuclear facilities owned by AmerGen" were insufficient to trigger our hearing process). *See also Oyster Creek*, 51 NRC at 209-10.

Nor do we believe a hearing is merited by CAN's conclusory assertions that the corporate culture of Entergy Nuclear Operations will be tainted by the influence of high-level officials from the parent company and other subsidiaries. CAN does not identify which officials will undercut safety at Indian Point and FitzPatrick or explain how they will do so. CAN's claims are too broad and too vague to be suitable for adjudication. We therefore decline to admit this issue.

d. Cost-Cutting Pressures

CAN questions whether Entergy FitzPatrick and Entergy Indian Point can safely accomplish the goals necessary for the companies to reduce costs to a level sufficiently low for the plants' electric rates to be competitive, i.e.,

⁵⁷ *See* CAN's Petition at 39-40 (citing and quoting Public Utility Commission of Texas, Docket No. 18249, *Entergy Gulf States, Inc., Service Quality Issues* (February 1998); Groesch, *Report to New Orleans City Council for the Alliance for Affordable Energy* (Aug. 13, 1999); and Groesch, *Statement Before the New Orleans City Council Utility Committee* (Aug. 12, 1999)). The second and third of these three documents are included in Exh. 9 to CAN's petition.

reducing maintenance and outage times and workforce size.⁵⁸ According to CAN, Entergy's applications indicate a goal of 85% capacity (or 15% downtime). CAN acknowledges that PASNY was able to meet the same refueling schedule at Indian Point 3 that Entergy will need to maintain, but says that PASNY did so only by unnecessarily exposing its workforce to radiation. *See* CAN's Petition at 41-42. Finally, CAN draws the Commission's attention to ConEd's decision not to replace the steam generators at Indian Point Unit 2, warning that Entergy will experience cost-cutting pressures similar to those that led to ConEd's problems.⁵⁹

CAN has failed to provide adequate support or basis for its general "cost-cutting" issue. It has not provided the necessary nexus between the problems at other plants (some not even in this country) operated by different companies and the difficulties it anticipates from Entergy FitzPatrick, Entergy Indian Point, and Entergy Nuclear Operations. *See Oyster Creek*, CLI-00-6, 51 NRC at 209-10. Nor does it offer any factual support for its claim that the Entergy companies will subordinate safety to production goals or profits. *See id.* at 207 ("Absent [documentary] support, this agency has declined to assume that licensees will contravene our regulations") and cited authority. Finally, CAN's speculation about the likelihood and ramifications of staff reductions is insufficient to trigger a hearing on this issue. CAN points to no information suggesting that Entergy plans to reduce its staff below NRC requirements. As we stated in *Oyster Creek*:

For key positions necessary to operate a plant safely, the Commission has regulations requiring specific staffing levels and qualifications. *See* 10 C.F.R. § 50.54(m). Other than those specific positions, the licensee has a responsibility to ensure that it has adequate staff to meet the Commission's regulatory requirements. If a licensee's staff reductions or other cost-cutting decisions result in its being out of compliance with NRC regulations, then (as noted above) the agency can and will take the necessary enforcement action to ensure the public health and safety. The *Oyster Creek* application does not on its face suggest any likelihood of a cost-driven lapse in compliance with NRC safety rules.

CLI-00-6, 51 NRC at 209. *See also id.* at 214 ("so long as personnel decisions do not impose [a] risk [to the public health and safety], our regulations and policy do not preclude a licensee from reducing or replacing portions of its staff").

⁵⁸ *See* CAN's Petition at 41-47. CAN points to the problems of a foreign nuclear plant owner, British Energy, as an example of how public safety can be adversely affected by overreduction of the workforce. *See id.* at 44-46. *See also* Declaration of David A. Lochbaum, dated July 31, 2000, at 2 (¶9(a)), appended as Attachment 3 to CAN's Petition.

⁵⁹ *See* CAN's Petition at 42. ConEd has informed the NRC that it has replaced these steam generators. *See* Letter from John A. Zwolinski (NRC) to A. Alan Blind (ConEd) (Oct. 11, 2000).

5. *The Association's Labor-Related Technical Qualifications Issues*

The Association raises labor-related issues which, it claims, bear directly on the question whether the transfer will ensure the presence of “sufficient management personnel, and appropriate working conditions, so as to assure continued safe operation of the facilities.” See Association’s Petition at 9. As noted in the discussion of standing, *supra*, the Association alleges a precipitous decline in morale among the members of the Association; a high level of confusion regarding future rights and benefits; a significantly increased attrition rate among Association members; a general belief that the transfer will markedly reduce their rights and benefits; and a developing uneasiness with, and unwillingness to trust, or communicate safety-related problems to, senior executive nuclear management or corporate management. See Association’s Petition at 17.

The Association’s claims arise out of what it says is the “increasingly adversarial nature of the dialogue (or lack thereof) between its members and the proposed transferor and transferees concerning the putative rights and benefits that will be available to Petitioners following the proposed transfer.” See *id.* A contest over “putative rights and benefits” amounts, of course, to a labor dispute rooted in economic concerns. Indeed, the Association has brought state-court litigation to adjudicate the labor controversy and, as if to stress the labor relations nature of its claims, the Association has included its lengthy state-court complaint in the record before us.⁶⁰

As a nuclear safety agency, however, we are loath to step into the middle of a labor dispute. The Association seemingly expects us to consider whether Entergy’s commitments regarding salary, benefits, and job security are so unjust as to ruin employee morale and cause excessive attrition at FitzPatrick and Indian Point 3. But we have neither the expertise nor the legislative charter of a National Labor Relations Board or labor mediator. We see no natural limits to the labor issues the Association wants us to consider. We thus find the Association’s labor grievances unsuitable for a license transfer hearing.

The Association, apparently sensitive to the Commission’s reluctance to enmesh itself in management-worker conflicts at nuclear facilities, attempts to argue that its labor dispute with PASNY and Entergy translates into a health-and-safety problem that the Commission should consider at a hearing. But, while the Association’s pleadings frequently allude to alleged health-and-safety effects of the labor controversy, what the Association has given us, at bottom, consists of specific accusations of bad faith in labor relations and that are tied to vague or conclusory assertions about health and safety. On the latter issue, the only one

⁶⁰ See Verified Petition, *Nuclear Generation Employees Ass’n v. New York Power Auth.* (Sup. Ct., Westchester Co., NY), Index No. 11129/00 (filed July 27, 2000) (appended to Association’s Reply Brief as Exh. 1). See also Association’s Reply Brief, dated Aug. 3, 2000, at 3.

falling within the NRC's jurisdiction, the Association provides no expert support, no concrete facts, and no claims of specific rule violations.

Further, the specific concerns about pay, benefits, and conditions that the Association points to as the source for morale issues are potential (not certain) changes in pay, benefits, and conditions that would not occur for between 1 and 3 years after completion of the transfer. The Commission is particularly reluctant to engage in prognostication of the impact of changes in current working conditions that the Association has in its own pleadings and affidavits acknowledged may occur years in the future. Unsupported hypothetical theories or projections, even in the form of an affidavit, will not support invocation of the hearing process. In short, the Association has not provided tangible regulatory issues around which to organize a hearing.

The Association's most specific health-and-safety claims are charges that the labor controversy will provoke high attrition and poor morale. But neither claim raises a genuine controversy for hearing. As for the purported increase in attrition, the Association merely says that it is so. The Association does not provide factual data, expert witnesses, or even affidavits of employees who have or will quit as a result of the license transfer.⁶¹ As for morale, we do not see how we could adjudicate such an abstract concept at a hearing absent some allegation of specific rule violations or specific safety challenges arising out of lower morale. Notably, the Association has submitted no evidence, such as inspection reports or other indicators, suggesting an increase in safety problems at the two plants.

We add a cautionary note. Today's decision does not hold that economic concerns, whether of a labor, commercial, or other nature, are categorically excluded from the NRC hearing process. Such concerns, if closely tied to specific health-and-safety concerns or to potential violations of NRC rules, can be admitted for hearing. *See, e.g., North Atlantic Energy Service Corp. (Seabrook Station, Unit 1), CLI-99-27, 50 NRC 257, 262-63 (1999)*. Indeed, in our Subpart M rulemaking, which established our current license transfer hearing process, we expressed a willingness to review labor-type issues to a limited extent:

[I]f a significant loss and replacement of critical plant personnel can be anticipated as the result of a particular license transfer[,] this might well be a reason not to approve the transfer or to condition the transfer on the maintenance of adequate technical qualifications.

* * * *

If, in a particular license transfer case, a need is identified for submission of a critical staff retention plan in order to address the applicant's technical qualifications, this matter can readily

⁶¹The Association's failure to provide actual data on departing employees renders virtually meaningless its reference to a "more than doubl[ing]" of the normal attrition rate for its members. *See* Joint Declaration at 6. By way of extreme example, if the normal attrition rate were one person per year per plant, a doubling of this rate would provide no conceivable basis for health-and-safety concerns.

be addressed in the hearing process and can ultimately result in a condition on license transfer approval.

Final Rule, “Streamlined Hearing Process for NRC Approval of License Transfers,” 63 Fed. Reg. 66,721, 66,723 (Dec. 3, 1998).

Claims resting on the loss and replacement of “critical” staff derive directly from our rules, which specify both minimum staffing requirements for trained operators at reactors and the technical qualifications of such employees. *See* 10 C.F.R. § 50.54(m). *See also Oyster Creek*, CLI-00-6, 51 NRC at 209 (NRC staffing regulations cover “key positions necessary to operate the plant safely”). Here, the Association asserts no current or future section 50.54(m) violations arising out of the PASNY-Entergy license transfer. (Nor, frankly, would we expect such a challenge from the Association, some of whose members hold the very staff positions covered by section 50.54(m).)

Notwithstanding the narrow exception in the rulemaking language quoted above, the Commission generally does not involve itself in the personnel decisions of licensees. As we indicated in *Oyster Creek*:

the Commission is interested in whether the plant poses a risk to the public health and safety, and so long as personnel decisions do not impose that risk, our regulations and policy do not preclude a licensee from reducing or replacing portions of its staff.

CLI-00-6, 51 NRC at 214. *See also Vermont Yankee*, CLI-00-20, 52 NRC at 170 n.16 and accompanying text. We would require personnel claims considerably more concrete than the Association’s — i.e., specific indications of a potential rule violation or of deteriorating safety conditions linked to the license transfer — before we would consider admitting plant staffing questions into an NRC license transfer hearing.

We by no means intend to denigrate the concerns of the Association’s members, who work at FitzPatrick and Indian Point 3 and have an understandable interest in working conditions at the two plants. The question whether those conditions are fair and lawful is an important one. But our license transfer hearings under Subpart M are designed solely to adjudicate genuine health-and-safety disputes arising out of license transfers. The grant of hearings merely on the broad assertion that contentious labor controversies will lead to deleterious health-and-safety consequences would have no stopping point and would risk converting our agency into a labor relations forum, contrary to our statutory mission and at a significant cost in resources and effort.

For these reasons, we decline to admit for hearing the Association's labor-related issues.⁶²

6. *Issues Involving Emergency Evacuation Plans*

Cortlandt asks the Commission to consider the impact of the proposed transfers on the need for changes to the Emergency Evacuation Plans. *See* Cortlandt's Supplemental Filing at 2. It expresses similar concerns about whether the transferees for Indian Point 3 will discontinue the emergency warning program, emergency preparedness training program, and health impact training program currently run by PASNY.⁶³

The new licensees will have to meet all of the requirements of 10 C.F.R. § 50.47 and Appendix E to 10 C.F.R. Part 50 concerning emergency planning and preparedness. The emergency notification system is required by the regulations and will remain in place. Cortlandt has not alleged, with supporting facts, that Entergy is likely to violate the NRC's emergency planning rules. Under these circumstances, we see no basis for further pursuit of this issue.

7. *Appropriateness of Indian Point 3 Transfer, Given Its Location*

Cortlandt asks the Commission to consider the appropriateness of the proposed Indian Point 3 transfer in light of the plant's proximity to metropolitan areas (New York City, White Plains, and Peekskill) and to locations for sporting and cultural events. *See* Cortlandt's Supplemental Filing at 4. Cortlandt explains that the plant is located 24 miles north of New York City in the heavily populated Westchester County, and that it is 2 miles from the City of Peekskill (population 20,000), 2 miles from a military reservation (Camp Smith), and 8 miles from West Point. *See* Affirmation of Peter Henner ¶¶ 2-3. We do not see how Indian Point 3's proximity to these locations is relevant to the question whether to approve the license transfer for that plant. We therefore decline to admit this issue.

⁶² Like the Association, CAN raises the issue that much of the plants' existing staff will quit their jobs as a result of the transfer. *See* CAN's Petition at 44; CAN's Reply Brief at 16. But CAN has provided little detail, and no backup support, for this claim. For the reasons stated in the text, CAN's claims on this score are inadmissible. *See also Oyster Creek*, CLI-00-6, 51 NRC at 209-10, 214.

⁶³ *See* Affirmation of Peter Henner ¶ 25(d); Cortlandt Verified Petition at 5, 8, 19 (referring to "emergency planning and health impact training programs"; "emergency preparedness plans, local preparedness resources, and the Four County Notification System"; and "the payment of the State Emergency Management Office, bus driver training and reception centers, public education programs, including emergency planning and radiological training and medical drills").

8. *Antitrust Issue*

Cortlandt expresses an antitrust concern that, if Entergy merges with Florida Power and Light Company (FPL Group), the combined entity's market share will give it an inordinate amount of control over the nation's nuclear industry. Cortlandt's Reply Brief at 17. As we have explained in prior cases, the Commission no longer conducts antitrust reviews in license transfer proceedings.⁶⁴

CAN also raises the antitrust issue, acknowledging our precedents but disagreeing with them. CAN criticizes the Commission for having declined to conduct further antitrust review in these cases, calls that decision an abdication of the agency's antitrust responsibilities under the AEA, and predicts that such abdication will lead to a rapid consolidation of nuclear power ownership through premature acceptance of this and other Entergy applications and overly accelerated hearing schedules. CAN's Petition at 13. *See also id.* at 14-15, 56-64; CAN's Reply Brief at 18-20. For the reasons set forth in both the *Wolf Creek* decision and the rulemaking, *supra*, we do not agree with CAN's characterization that we are abdicating our statutory authority. Nor do we believe we are acting precipitously in giving expedited treatment to license transfer applications. We therefore find this issue inadmissible.⁶⁵

9. *Independent Evaluation of the Plants*

CAN asserts that, given the historical problems in NRC's Region I, the Commission should arrange for an independent analysis of the two plants' conditions. *See* CAN's Petition at 51-54. We decline to do so for the same reasons we gave in *Vermont Yankee* when rejecting CAN's similar issue:

An inquiry such as the one CAN advocates would go considerably beyond the scope of our inquiry in this proceeding, i.e., AmerGen Vermont's qualifications to own and operate the Vermont Yankee plant. We also note that Region I's overall performance in overseeing Vermont Yankee is far outside the scope of a license transfer proceeding. CAN does not explain how any action taken with respect to this license transfer, whether it be denial of the license or the imposition of conditions on the transferee, could remedy CAN's broad complaints that NRC's Region I has abdicated its oversight responsibilities.⁶⁶

⁶⁴ *See Vermont Yankee*, CLI-00-20, 52 NRC at 168, 174; *Oyster Creek*, CLI-00-6, 51 NRC at 210; *Kansas Gas and Electric Co.* (Wolf Creek Generating Station, Unit 1), CLI-99-19, 49 NRC 441 (1999). *See also* Final Rule, "Antitrust Review Authority: Clarification," 65 Fed. Reg. 44,649 (July 19, 2000).

⁶⁵ Regarding CAN's prediction of industry consolidation, *see* note 16, *supra*.

⁶⁶ CLI-00-20, 52 NRC at 171. *See also Curators of the University of Missouri*, CLI-95-1, 41 NRC 71, 121 (1995); Final Rule, "Rules of Practice for Domestic Licensing Proceedings — Procedural Changes in the Hearing Process," 54 Fed. Reg. 33,168, 33,171 (Aug. 11, 1989) ("With the exception of NEPA issues, the sole focus of the hearing is on whether the application satisfies NRC regulatory requirements, rather than the adequacy of the NRC Staff performance").

V. OTHER PROCEDURAL MATTERS

A. Designation of Issues

Our opinion in this case has considered in some detail numerous concerns raised by the various Petitioners. Some issues we have found admissible, and some inadmissible. To avoid confusion, and to delineate the boundaries of the admitted issues, we direct the parties to organize their presentations at the hearing around the following two issues:

Whether Entergy Indian Point's liability for certain financial obligations of Entergy FitzPatrick would place the Indian Point 3 plant in financial jeopardy in the event of an accident at either Indian Point 3 or FitzPatrick and would thereby call into question whether Entergy Indian Point has the funds necessary to operate the Indian Point plant safely, within the meaning of 10 C.F.R. §§ 50.33(f)(2), 50.33(f)(3), and 50.80(b)?

Whether the transfer Applicants' plan for handling decommissioning funds for the FitzPatrick and Indian Point nuclear plants — whereby control of the decommissioning funds will remain with PASNY but responsibility for decommissioning the plants will reside with the Entergy companies — provides reasonable assurance of adequate decommissioning funding, within the meaning of 10 C.F.R. §§ 50.75(b) and 50.75(e)(1)(vi).

The precise contours of these two admitted issues are set forth above at pp. 296-97 (issue 2a, raised by Cortlandt regarding the effect of joint and several liability on the Entergy companies' financial qualifications) and 301-02 (issue 3a, raised by the Association and CAN regarding whether the decommissioning funding arrangement is consistent with the requirements of 10 C.F.R. § 50.75), respectively. The parties' filings and arguments must be confined to the contours of these two issues. In addition, as indicated on p. 300, we permit CAN and Cortlandt to submit a revised issue challenging the Entergy companies' cost-and-revenue projections, such issue to be filed within 20 days of the issuance of a protective order giving CAN and Cortlandt access to Applicants' proprietary information.

The parties should be prepared to offer prefiled testimony and exhibits containing *specific* facts and/or expert opinion in support of their positions on these issues. All parties should keep their pleadings as short, and as focused on the admitted issues, as possible. The Commission will not consider new issues or new arguments or assertions related to the admitted issues at the hearing, unless they satisfy our rules for late-filed issues (10 C.F.R. § 2.1308(b)), and will not consider claims rejected in the course of this opinion. Redundant, duplicative, unreliable, or irrelevant submissions are not acceptable and will be stricken from the record. *See* 10 C.F.R. § 2.1320(a)(9). We also direct the Intervenors to state explicitly exactly what remedial measures (if any) they believe the Commission should take in addition to those specified in their intervention petitions.

B. Designation of Presiding Officer

The Commission directs the Chief Administrative Judge promptly to appoint a Presiding Officer for this proceeding. Until the appointment of a Presiding Officer, the parties should file any written submissions with the Office of the Secretary.

C. Notices of Appearance

To the extent that they have not already done so, each counsel or representative for each party shall, not later than 11:59 p.m. on December 7, 2000 (i.e., 10 days after the issuance date of this Order), file a notice of appearance complying with the requirements of 10 C.F.R. § 2.713(b). In each such notice of appearance, the counsel or representative should specify his or her business address, telephone number, facsimile number, and e-mail address. Any counsel or representative who has already entered an appearance but who has not provided one or more of these pieces of information should do so not later than the date and time specified above.

D. Filing Schedule

If the parties agree to a non-oral hearing, they must file their joint motion for a “hearing consisting of written comments” no later than 11:59 p.m. (Eastern Time) on December 12, 2000 (i.e., 15 days of the date of this Order). 10 C.F.R. § 2.1308(d)(2). No later than that same date, the parties should complete any necessary negotiations on a protective order regarding any proprietary data and should submit a joint protective order to the Presiding Officer. If they are unsuccessful in negotiating such an order, they should inform the Presiding Officer by that date and indicate any areas in which they were able to agree.⁶⁷ We also direct the parties to confer promptly on whether this proceeding might be settled amicably without conducting a hearing.

All initial written statements of position and written direct testimony (with any supporting affidavits) must be filed no later than 11:59 p.m. on December 27, 2000 (30 days after the issuance date of this Order). 10 C.F.R. §§ 2.1309(a)(4), 2.1310(c), 2.1321(a), 2.1322(a)(1). All written responses to direct testimony, all rebuttal testimony (with any supporting affidavits), and all proposed questions directed to written direct testimony must be filed no later than 11:59 p.m. on

⁶⁷ Separately, we have directed CAN and Cortlandt to formulate and submit a properly supported financial qualifications issue within 20 days of the entry of a protective order. *See* p. 300, *supra*. CAN’s failure to do so will preclude its participation with regard to the financial qualifications issue. If such an issue is submitted, the Presiding Officer should establish a supplemental briefing schedule to permit answers and replies thereto. *Cf.* 10 C.F.R. § 2.1307.

January 16, 2001 (the first working day following the twentieth day after the submission of written statements of position and written testimony). 10 C.F.R. §§ 2.1309(a)(4), 2.1310(c), 2.1321(b), 2.1322(a)(2)-(3). All proposed questions directed to written rebuttal testimony must be submitted to the Presiding Officer no later than 11:59 p.m. on January 26, 2001 (10 days after the submission of rebuttal testimony).⁶⁸

If the parties do not unanimously seek a hearing consisting of written comments, the Presiding Officer will hold an oral hearing beginning at 9:30 a.m. on February 2, 2001, at the Commission's headquarters in Rockville, MD. The subject of the hearing will be the issues designated above, along with any admissible financial qualifications issue regarding the Entergy companies' cost-and-revenue projections that CAN and/or Cortlandt may choose to submit within 20 days of the entry of a protective order. Portions of the hearing may have to be closed to the public when issues involving proprietary information are being addressed.

Any party or participant submitting prefiled direct testimony should make the sponsor of that testimony available for questioning at the hearing. The Presiding Officer will issue an order establishing the amount of time available for the initial and reply presentations of the parties and participant. Given the expedited nature of license transfer proceedings, the Commission anticipates that the hearing will take no longer than 1 day. The hearing will not include opportunities for cross-examination, although the Presiding Officer may question any witness proffered by any party. *See* 10 C.F.R. §§ 2.1309, 2.1310(a), 2.1322(b).

Finally, all written post-hearing statements of position must be filed no later than 11:59 p.m. on February 22, 2001 (20 days after the oral hearing). *See* 10 C.F.R. § 2.1322(c). The Commission expects to issue a final memorandum and order on the merits of this proceeding by March 26, 2001 (50 days after the oral hearing).

The Commission is confident that the proceeding can be resolved fairly and efficiently within the prescribed time schedule.

E. Participants in the Hearing and the Proceeding; Service List

The parties to this proceeding will be CAN, Cortlandt, the Association, the Power Authority of the State of New York, Entergy Nuclear Operations, Entergy FitzPatrick, and Entergy Indian Point. Westchester will be a governmental participant in the proceeding. The recipients on the service list will be:

⁶⁸ *See* 10 C.F.R. §§ 2.1309(a)(4), 2.1310(c), 2.1321(b), 2.1322(a)(4). The 7-day filing period specified in the last two of these regulations is, pursuant to 10 C.F.R. § 2.1314(b), extended by 3 days, because the period includes a Saturday and a Sunday.

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⁶⁹ Mr. Egan's office is located in Washington, DC, but his phone number has a Northern Virginia area code. There appears to be an error here. If so, the Commission requests Mr. Egan to correct it.

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We direct the parties immediately to supplement or correct the above information to the extent that it is incomplete or inaccurate, and immediately to notify all recipients of any such changes.

Pursuant to 10 C.F.R. § 2.1316(b)-(c), the NRC Staff has indicated that it will not be a party to this proceeding. Notwithstanding this fact, the Staff is still expected both to offer into evidence its SER and to proffer one or more sponsoring witnesses for that document. *See* 10 C.F.R. § 2.1316(b).

F. Service Requirements

Although the parties and Westchester have a number of options under 10 C.F.R. § 2.1313(c) by which to serve their filings, the preferred method of filing in this proceeding is electronic (i.e., by e-mail). Electronic copies should be in WordPerfect format (in a version at least as recent as 6.0). Service will be considered timely if sent not later than 11:59 p.m. of the due date under our Subpart M rules. However, we also require the parties to submit a single signed hard copy of any such filings⁷⁰ to the Rulemakings and Adjudications Branch, Office of the Secretary, U.S. Nuclear Regulatory Commission, 11555 Rockville Pike, Room O-16-H-15, Rockville, MD 20852. As noted above, the fax number for this office is (301) 415-1101 and the e-mail address is secy@nrc.gov.

VI. CONCLUSION

For the reasons set forth above:

1. The license transfer adjudications involving FitzPatrick and Indian Point 3 license transfers are *consolidated*.
2. CAN's, Cortlandt's, and the Association's petitions to intervene and requests for hearing are *granted*.
3. Westchester's petition for governmental participant status is *granted*.

⁷⁰ We draw the attention to the difference between this requirement and that of Subpart G, which provides that any service, whether by fax or e-mail, on the Secretary should be followed with an original and two conforming copies of the service by regular mail in accordance with 10 C.F.R. § 2.708(d).

4. The Association's and CAN's motions for stay are *denied*.
5. Cortlandt's motion to expand this adjudication's scope of review is *denied*.
6. CAN's motion for a Subpart G hearing is *denied*.
7. CAN and Cortlandt may formulate and submit a properly supported financial qualifications issue within 20 days of the entry of a protective order.
8. The parties are required to inform the Commission of any court or administrative orders, settlements, or business decisions that may in any way relate to, or render moot, part or all of the instant proceeding.
9. Within 15 days of the issuance date of this Order, the parties shall complete any necessary negotiations on a protective order regarding any proprietary data and shall submit a joint protective order to the Presiding Officer. If they are unsuccessful in negotiating such an order, they shall so inform the Presiding Officer by that date and shall indicate any areas in which they were able to agree.

IT IS SO ORDERED.

For the Commission⁷¹

ANNETTE L. VIETTI-COOK
Secretary of the Commission

Dated at Rockville, Maryland,
this 27th day of November 2000.

⁷¹ Commissioner Dicus was not present for the affirmation of this Order. Had she been present, she would have affirmed her prior vote to approve this Order.

UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

COMMISSIONERS:

Richard A. Meserve, Chairman
Greta Joy Dicus
Nils J. Diaz
Edward McGaffigan, Jr.
Jeffrey S. Merrifield

In the Matter of

**Docket Nos. 50-250-LR
50-251-LR**

**FLORIDA POWER & LIGHT
COMPANY
(Turkey Point Nuclear Generating
Plant, Units 3 and 4)**

November 27, 2000

In this Order, the Commission refers to the Atomic Safety and Licensing Board Panel, for assignment of a Licensing Board to rule on, two separate petitions to intervene and requests for a hearing filed in the matter of the Licensee's application for renewal of its operating licenses for Turkey Point Units 3 and 4. The Commission provides the Licensing Board with guidance for the conduct of the proceeding if a hearing is granted, and a suggested schedule for any proceeding.

RULES OF PRACTICE: SCOPE OF PROCEEDING

OPERATING LICENSE RENEWAL

The scope of a proceeding on an operating license renewal is limited to a review of the plant structures and components that will require an aging management review for the period of extended operation and the plant's systems, structures, and components that are subject to an evaluation of time-limited aging analyses. *See* 10 C.F.R. §§ 54.21(a) and (c), 54.4.

RULES OF PRACTICE: SCOPE OF PROCEEDING

OPERATING LICENSE RENEWAL

Review of environmental issues in a licensing renewal proceeding is limited in accordance with 10 C.F.R. §§ 51.71(d) and 51.95(c).

ORDER

(Referring Petition for Intervention and Request for Hearing to Atomic Safety and Licensing Board Panel)

I. INTRODUCTION

On September 11, 2000, Florida Power & Light Company (“the Applicant”) submitted an application to renew the operating licenses for its Turkey Point Units 3 and 4, located in Miami-Dade County, Florida. The notice of receipt of application was published in the *Federal Register* on September 26, 2000. Florida Power & Light Company; Turkey Point Plant (Units 3 and 4), Notice of Receipt of Application for Renewal of Facility Operating Licenses Nos. DPR-31 and DPR-41, 65 Fed. Reg. 57,847 (2000). On October 12, 2000, the Staff of the Nuclear Regulatory Commission (Staff) issued a Notice of Acceptance for Docketing of the Application and Notice of Opportunity for a Hearing, 65 Fed. Reg. 60,693 (2000).

A petition to Intervene and request for hearing was filed in accordance with 10 C.F.R. § 2.714 by Mr. Mark P. Oncavage, an individual, on October 24, 2000. In letters dated October 13 and October 23, 2000, the Commission also received a request for extension of time to file an intervention petition and hearing request from another individual, Ms. Joette Lorion. The Commission granted Ms. Lorion’s extension request by order dated November 6, 2000, allowing Ms. Lorion until November 27, 2000, to file her intervention petition and hearing request. The Commission received Ms. Lorion’s intervention petition and hearing request on November 24, 2000. This Order refers these intervention petitions and requests for hearing to the Chief Administrative Judge of the Atomic Safety and Licensing Board Panel for assignment of an Atomic Safety and Licensing Board to rule on these and any additional requests for hearing and petitions for leave to intervene and, if a hearing is granted, to conduct the proceeding. We also provide the Licensing Board with guidance for the conduct of any proceeding if a hearing is granted, and a suggested schedule for any such proceeding.

II. COMMISSION GUIDANCE

A. Scope of Proceeding

The scope of this proceeding is limited to a review of the plant structures and components that will require an aging management review for the period of extended operation and the plant's systems, structures, and components that are subject to an evaluation of time-limited aging analyses. See 10 C.F.R. §§ 54.21(a) and (c), 54.4; Nuclear Power Plant License Renewal; Revisions, Final Rule, 60 Fed. Reg. 22,461 (1995). In addition, review of environmental issues is limited in accordance with 10 C.F.R. §§ 51.71(d) and 51.95(c). See NUREG-1437, "Generic Environmental Impact Statement for License Renewal of Nuclear Power Plants"; Environmental Review for Renewal of Nuclear Power Plant Operating Licenses, Final Rule, 61 Fed. Reg. 28,467 (1996), amended by 61 Fed. Reg. 66,537 (1996). The Licensing Board shall be guided by these regulations in determining whether proffered contentions meet the standard in 10 C.F.R. § 2.714(b)(2)(iii). It is the responsibility of the Petitioner to provide the necessary information to satisfy the basis requirement for the admission of its contentions and demonstrate that a genuine dispute exists within the scope of this proceeding. If rulings on the admission of contentions or the admitted contentions themselves raise novel legal or policy questions, the Licensing Board should readily refer or certify such rulings or questions to the Commission on an interlocutory basis. The Commission itself is amenable to such early involvement and will evaluate any matter put before it to ensure that substantive interlocutory review is warranted.

The Commission expects that matters within the scope of this proceeding but not put into controversy will be considered by the Licensing Board only where the Licensing Board finds that a serious safety, environmental, or common defense and security matter exists. Such consideration should be exercised only in extraordinary circumstances. If the Licensing Board decides to raise a matter on its own initiative, a copy of its ruling, setting forth in general terms its reasons, must be transmitted to the Commission. The Licensing Board should not proceed to consider such *sua sponte* issues unless the Commission approves the Licensing Board's proposal to do so.

B. Discovery Management

Similar to the practice under current Rule 26 of the *Federal Rules of Civil Procedure*, if a hearing is granted, the Licensing Board should order the parties to provide certain information to the other parties without waiting for discovery requests. This information will include the names and addresses of individuals likely to have discoverable information relevant to the admitted contentions, the names of individuals likely to be witnesses in this proceeding, the identification

and production of documents (not already publicly available) that will likely contain discoverable information, and any other information relevant to the admitted contentions that the Licensing Board may require in its discretion.

Within 30 days of any Licensing Board order granting a request for a hearing, the Staff shall file in the docket, present to the Licensing Board, and make available a case file to the Applicant and any other party to the proceeding. The Staff will have a continuing obligation to keep the case file up to date, as documents become available. The case file will consist of the application and any amendments thereto, the Final Environmental Impact Statement (in the form of a plant-specific supplement to the GEIS), any Staff safety evaluation reports relevant to the application, and any correspondence between the Applicant and the NRC that is relevant to the application. Formal discovery against the Staff, pursuant to 10 C.F.R. §§ 2.720(h), 2.740, 2.742, and 2.744, regarding the Staff's safety and environmental review documents will be suspended until after issuance of the final Safety Evaluation Report (SER) — i.e., the Supplemental SER — and the Final Supplemental Environmental Impact Statement (FES),¹ unless the Licensing Board in its discretion finds that starting discovery against the Staff on safety issues before the final SER is issued will expedite the hearing without adversely impacting the Staff's ability to complete its evaluations in a timely manner.

The Licensing Board, consistent with fairness to all parties, should narrow the issues requiring discovery and limit discovery to no more than one round each for original and late-filed contentions.

C. Proposed Schedule

The Commission directs the Licensing Board to set a schedule for any hearing granted in this proceeding that establishes as a goal the issuance of a Commission decision on the pending application in about 2½ years from the date that the application was received. In addition, if the Licensing Board grants a hearing, once the Licensing Board has ruled on any petition for intervention and request for a hearing, formal discovery against the Staff shall be suspended until after the Staff completes its final SER and FES, subject to the discretion discussed above of the Licensing Board to proceed with discovery against the Staff on safety issues prior to the issuance of the final SER, or to proceed with discovery against the Staff on either the FES or final SER (*see* note 1, *supra*). The evidentiary hearing should not

¹This is based on the Staff's review schedule for the Florida Power & Light application, which indicates that the final SER and FES will be issued fairly close in time. If this is not the case, the Board, in its discretion, may commence discovery against the Staff on safety issues if the final SER is issued before the FES or on environmental issues if the FES is issued before the final SER. In addition, as discussed *infra*, the Board has the discretion in the appropriate circumstances to permit discovery to begin against the Staff with respect to safety issues before the issuance of the final SER.

commence until after completion of the final SER and FES, unless the Licensing Board in its discretion finds that starting the hearing with respect to safety issues prior to issuance of the final SER will expedite the proceeding without adversely impacting the Staff's ability to complete its evaluations in a timely manner. The Commission believes that, in the appropriate circumstances, allowing discovery or an evidentiary hearing with respect to safety-related issues to proceed before the final SER is issued will serve to further the Commission's objective, as reflected in the *Statement of Policy on Conduct of Adjudicatory Proceedings*, CLI-98-12, 48 NRC 18, 21, 24 (1998), to ensure a fair, prompt, and efficient resolution of contested issues.² The Commission also believes that the goal of issuing a decision on the pending application in about 2 1/2 years may be reasonably achieved under the current rules of practice and the enhancements directed by this Order and by our understanding of the Staff's current schedule for review of the application. We do not expect the Licensing Board to sacrifice fairness and sound decisionmaking to expedite any hearing granted on this application. We do expect, however, the Licensing Board to use the techniques specified in this Order and in the Commission's policy statement on the conduct of adjudicatory proceedings (*id.*) to ensure prompt and efficient resolution of contested issues. *See also Statement of Policy on Conduct of Licensing Proceedings*, CLI-81-8, 13 NRC 452 (1981).

If a hearing is granted, in developing a schedule, the Licensing Board should adopt the following milestones for conclusion of significant steps in the adjudicatory proceeding:

- Within 90 days of November 27, 2000: Decision on intervention petitions and contentions. Start of discovery on admitted contentions, except against the Staff.
- Within 30 days of the issuance of final SER and FES: Completion of discovery against the Staff on admitted contentions. Late-filed contentions to be filed.
- Within 40 days of the issuance of final SER and FES: Responses to late-filed contentions to be filed.
- Within 50 days of the issuance of final SER and FES: ASLB decision on late-filed contentions.
- Within 80 days of the issuance of final SER and FES: Completion of discovery on late-filed contentions.

²For example, it may be appropriate for the Licensing Board to permit discovery against the Staff and/or the commencement of an evidentiary hearing with respect to safety issues prior to the issuance of the final SER in cases where the Applicant has responded to the Staff's "open items" and there is an appreciable lag time until the issuance of the final SER, or in cases where the initial SER identifies only a few open items.

- Within *90 days* of the issuance of final SER and FES: Prefiled testimony to be submitted.
- Within *125 days* of the issuance of final SER and FES: Completion of evidentiary hearing.
- Within *220 days* of the issuance of final SER and FES: ASLB initial decision on application.

To meet these milestones, the Licensing Board should direct the participants to serve all filings by electronic mail (in order to be considered timely, such filings must be received by the Licensing Board and parties no later than midnight Eastern Time on the date due, unless otherwise designated by the Licensing Board), followed by conforming hard copies that may be sent by regular mail. If participants do not have access to electronic mail, the Licensing Board should adopt other expedited methods of service, such as express mail, which would ensure receipt on the due date (“in-hand”). If pleadings are filed by electronic mail, or other expedited methods of service that would ensure receipt on the due date, the additional period provided in our regulations for responding to filings served by first-class mail or express delivery shall not be applicable. *See* 10 C.F.R. § 2.710. In addition, to avoid unnecessary delays in the proceeding, the Licensing Board should not grant requests for extensions of time absent unavoidable and extreme circumstances. The Licensing Board shall not entertain motions for summary disposition under 10 C.F.R. § 2.749, unless the Licensing Board finds that such motions are likely to expedite the proceeding. Unless otherwise justified, the Licensing Board shall provide for the simultaneous filing of answers to proposed contentions, responsive pleadings, proposed findings of fact, and other similar submittals.

In addition, parties are obligated in their filings before the Licensing Board and the Commission to ensure that their arguments and assertions are supported by appropriate and accurate references to legal authority and factual basis, including, as appropriate, citation to the record. Failure to do so may result in material being stricken from the record or, in extreme circumstances, in a party being dismissed.

If a hearing is granted on this application, the Commission directs the Licensing Board to promptly inform the Commission, in writing, if the Licensing Board determines that any single milestone could be missed by more than 30 days. The Licensing Board should include an explanation of why the milestone cannot be met and the measures the Licensing Board will take to mitigate the failure to achieve the milestone and restore the proceeding to the overall schedule.

III. CONCLUSION

The Commission directs the Licensing Board to conduct this proceeding in accordance with the guidance specified in this Order. As in any proceeding, the Commission retains its inherent supervisory authority over the proceeding to provide additional guidance to the Licensing Board and participants and to resolve any matter in controversy itself.

It is so ORDERED.

For the Commission³

ANNETTE L. VIETTI-COOK
Secretary of the Commission

Dated at Rockville, Maryland,
this 27th day of November 2000.

³ Commissioner Dicus was not present for the affirmation of this Order. Had she been present, she would have affirmed her prior vote to approve this Order.

UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

ATOMIC SAFETY AND LICENSING BOARD

Before Administrative Judges:

Charles Bechhoefer, Presiding Officer
Thomas D. Murphy, Special Assistant

In the Matter of

Docket No. 40-8027-MLA-4
(ASLBP No. 99-770-09-MLA)

SEQUOYAH FUELS CORPORATION
(Gore, Oklahoma Site Decommissioning)

November 16, 2000*

In a proceeding considering a proposed restricted decommissioning plan for a uranium processing facility, under the Commission's informal hearing procedures, the Presiding Officer confirms his authority to determine whether a particular document should be included in the hearing file but denies a motion to have that document included in such file.

RULES OF PRACTICE: INFORMAL PROCEDURES
(HEARING FILE)

In an informal hearing, where discovery between the parties is not permitted, the NRC Staff has the obligation of preparing the hearing file (which is to include all relevant documents) and keeping it up-to-date throughout the proceeding. 10 C.F.R. § 2.1231(a), (c). The Presiding Officer, however, may determine whether or not a particular document is relevant to the proceeding and hence should be included in the hearing file.

*Re-served November 20, 2000.

**RULES OF PRACTICE: INFORMAL PROCEDURES
(HEARING FILE)**

Where a party seeks to have a document included in the hearing file, it must demonstrate the document's relevance to the proceeding and/or to that party's expressed areas of concern.

**MEMORANDUM AND ORDER
(Oklahoma's Objection to Staff Status Report)**

I. BACKGROUND

In my Memorandum and Order dated March 23, 2000, I deferred, at the request of the NRC Staff, then-pending substantive filings of the parties on various issues as a result of the Staff's prediction that it would not be completing its Environmental Impact Statement (EIS) for approximately 2½ years and that its Safety Evaluation Report (SER) would take another 3 months after completion of the EIS. I also required the Staff to file quarterly status reports on its progress on the EIS and SER, as well as any other matters of interest bearing upon this proceeding, with the first such report due by June 30, 2000. Such report was timely filed.

On September 29, 2000, the Staff filed its second status report. In that report, it noted that previously, in its letter dated February 14, 2000 (transmitting the Hearing File to the Judges and parties), it had mentioned that a document (known as the "Converdyn Agreement") contains material relevant to funding for decommissioning and hence relevant to the application but was not being submitted to the Judges and parties because of its proprietary status. In that letter, the Staff added that "[t]he parties have been advised that if and when they reach a proprietary agreement and/or a protective order is issued in this proceeding, the *relevant portions of the agreement* will be distributed pursuant to such agreement and/or order" (*id.* at 2, emphasis supplied). In the September 29, 2000 status report, however, the Staff stated, with regard to the Converdyn Agreement, that it "has revisited the issue [of the agreement's relevance to this proceeding] and has determined that the material in the Converdyn Agreement relevant to the subject application and to this proceeding *appears in the Site Decommissioning Plan at Table 5-1*, and thus is already part of the hearing file. Should circumstances change such that any other material in the Converdyn Agreement becomes relevant to this proceeding, the Staff will notify the Presiding Officer and the parties in the quarterly report" (*id.* at 2, emphasis supplied).

II. OKLAHOMA'S MOTION

On October 12, 2000, the State of Oklahoma, an Intervenor in this proceeding, filed what it termed an "Objection to Second Quarterly Report," which I interpret as a motion to have the Converdyn Agreement explicitly included in the hearing file. As justification, Oklahoma explains:

Upon information and belief, the Converdyn Agreement is a contract involving SFC [Sequoyah Fuels Corporation] and Converdyn (which is apparently a joint venture involving Allied-Signal Energy Services, Inc. and General Atomics Energy Services, Inc., an affiliate of General Atomics) under which SFC, and perhaps others, are paid certain fees and SFC's contracts are serviced by performing uranium hexafluoride (UF_6) production at Allied-Signal Energy Services, Inc.'s Metropolis, Illinois facility (citation omitted).

Oklahoma concludes that the Converdyn Agreement is "relevant" to this proceeding and hence should be included in the hearing file.

III. LICENSEE'S RESPONSE

In response, the Licensee on October 26, 2000, filed an answer asserting that Commission regulations place the burden of compiling the hearing file on the NRC Staff. *See* 10 C.F.R. § 2.1231(b). It also asserts that the Converdyn Agreement concerned providing funds to SFC, along with activities at another facility, and is not relevant to this proceeding, which concerns the adequacy of SFC's Site Decommissioning Plan (SDP). Nor is it relevant, according to SFC, to any of the areas of concern identified by Oklahoma in its request for a hearing. The Licensee notes that the adequacy of its funding was considered in another proceeding — *see Sequoyah Fuels Corp.* (Gore, Oklahoma Site Decontamination and Decommissioning Funding), LBP-95-18, 42 NRC 150 (1995), *aff'd*, CLI-97-13, 46 NRC 195 (1997) — and is not a proper issue in this proceeding.

IV. STAFF RESPONSE

For its part, the NRC Staff, in its November 1, 2000 response to Oklahoma's motion, reiterated that Table 5-1 of the SDP, which is already included in the hearing file, contains the only material in the Converdyn Agreement relevant to this proceeding. It states that, if any other material in the Converdyn Agreement becomes relevant to this proceeding, the Staff will notify the Presiding Officer and parties in its quarterly status report. Beyond that, it states — accurately in my view — that Oklahoma has not demonstrated why the portions of the

Converdyn Agreement not currently in the hearing file (bearing upon the source of decommissioning funding) may be relevant to the issues here under review.

V. RULING

The hearing file, as defined in 10 C.F.R. § 2.1231(b), consists of

the application and any amendment thereto, any NRC environmental impact statement or assessment relating to the application, and any NRC report and any correspondence between the applicant and the NRC *that is relevant to the application*. . . . The presiding officer shall rule upon any issue regarding the appropriate materials for the hearing file [emphasis supplied].

The Staff has the obligation of preparing the hearing file and of keeping it up to date throughout the proceeding. 10 C.F.R. § 2.1231(a), (c). As a concomitant to the provision regarding a hearing file, the informal hearing rules that govern this proceeding also bar all discovery between parties. 10 C.F.R. § 2.1231(d). The Presiding Officer, however, may determine whether or not a particular document (such as the Converdyn Agreement) is relevant to a proceeding and hence should be included in the hearing file. *See, e.g., Curators of the University of Missouri, LBP-90-33, 32 NRC 245 (1990); Curators, LBP-90-27, 32 NRC 40 (1990).*

In seeking to have the Converdyn Agreement included in the hearing file, Oklahoma appears to be relying on the Staff statement set forth above, made in conjunction with its providing the hearing file to the Presiding Officer and the parties, that the Converdyn Agreement was relevant (at least in part), together with the simultaneous Staff statement that the Agreement was not being provided at that time because of its proprietary status. Oklahoma has provided no further basis why it believes the Converdyn Agreement in its entirety should be included in the hearing file. On the other hand, the Staff observes that a portion of the Converdyn Agreement (apparently not proprietary) has already been included in the hearing file as part of another document and that the remaining portions (which apparently are proprietary) are not relevant and hence are not being included.

In my view, Oklahoma has not provided me with sufficient information to conclude that the portions of the Agreement currently not included in the hearing file may be relevant to the proceeding or, more important, to any of Oklahoma's accepted areas of concern. Although a suitable method of protecting from public disclosure the proprietary information that may be included in the Agreement could be devised, there has not thus far been presented to me an adequate basis for determining that it may be relevant to the proceeding or to any of Oklahoma's accepted areas of concern. Thus, I am at this time *denying* Oklahoma's motion to have the Converdyn Agreement included in the hearing file.

In that connection, I note that the Staff has volunteered to include the Agreement in the hearing file should it become relevant to any issues in the proceeding. Further, should Oklahoma become apprised of further information as to the relevance to its areas of concern of the excluded portions of the Agreement, it may reiterate its current request to have the entire Agreement included in the hearing file.

IT IS SO ORDERED.

Charles Bechhoefer, Presiding Officer
ADMINISTRATIVE JUDGE

Rockville, Maryland
November 16, 2000

[Copies of this Memorandum and Order were transmitted this date by e-mail to counsel for each of the parties.]

UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

ATOMIC SAFETY AND LICENSING BOARD

Before Administrative Judges:

G. Paul Bollwerk, III, Chairman
Dr. Jerry R. Kline
Dr. Peter S. Lam

In the Matter of

Docket No. 72-22-ISFSI
(ASLBP No. 97-732-02-ISFSI)

PRIVATE FUEL STORAGE, L.L.C.
(Independent Spent Fuel Storage
Installation)

November 28, 2000

In this 10 C.F.R. Part 72 proceeding concerning the application by Private Fuel Storage, L.L.C. (PFS), for a license to construct and operate an independent spent fuel storage installation (ISFSI) on the reservation of the Skull Valley Band of Goshute Indians in Skull Valley, Utah, the Licensing Board denies the request of Intervenor State of Utah (State) for reconsideration of the Board's determination in LBP-00-28, 52 NRC 226 (2000), denying admission of late-filed contentions Utah LL through Utah OO, which challenged aspects of the adequacy of the spent fuel transportation risk analysis in the NRC Staff's June 2000 draft environmental impact statement (DEIS), because a balancing of the five late-filing criteria found in 10 C.F.R. § 2.714(a)(1), did not warrant admitting the contentions.

MOTION FOR RECONSIDERATION: RAISING MATTERS FOR FIRST TIME; RAISING OVERLOOKED OR MISAPPREHENDED LEGAL OR FACTUAL MATTERS; RAISING PREVIOUSLY REJECTED ARGUMENTS; RAISING INHARMONIOUS RULINGS

RULES OF PRACTICE: MOTIONS FOR RECONSIDERATION (RAISING MATTERS FOR FIRST TIME; RAISING OVERLOOKED OR MISAPPREHENDED LEGAL OR FACTUAL MATTERS; RAISING PREVIOUSLY REJECTED ARGUMENTS; RAISING INHARMONIOUS RULINGS)

A properly supported reconsideration motion is one that does not rely upon (1) entirely new theses or arguments, except to the extent it attempts to address a presiding officer's ruling that could not reasonably have been anticipated, *see Louisiana Energy Services, L.P.* (Claiborne Enrichment Center), CLI-97-2, 45 NRC 3, 4 & n.1 (1997) (citing cases); or (2) previously presented arguments that have been rejected, *see Nuclear Engineering Co.* (Sheffield, Illinois Low-Level Radioactive Waste Disposal Site), CLI-80-1, 11 NRC 1, 5 (1980). Instead, the movant must identify errors or deficiencies in the presiding officer's determination indicating the questioned ruling overlooked or misapprehended (1) some legal principle or decision that should have controlling effect; or (2) some critical factual information. *See Georgia Power Co.* (Vogtle Electric Generating Plant, Units 1 and 2), LBP-94-31, 40 NRC 137, 140 (1994); *Philadelphia Electric Co.* (Limerick Generating Station, Units 1 and 2), LBP-83-25, 17 NRC 681, 687, *rev'd and remanded on other grounds*, ALAB-726, 17 NRC 755 (1983). Reconsideration also may be appropriately sought to have the presiding officer correct what appear to be inharmonious rulings in the same decision. *See LBP-98-10*, 47 NRC 288, 296 (1998).

**MEMORANDUM AND ORDER
(Denying Motion for Partial Reconsideration of LBP-00-28)**

In LBP-00-28, 52 NRC 226 (2000), we concluded that a balancing of the late-filing criteria of 10 C.F.R. § 2.714(a)(1) did not support the grant of an August 2, 2000 request by Intervenor State of Utah (State) to admit late-filed contentions Utah LL through Utah OO, which challenged the adequacy of the NRC Staff's June 2000 draft environmental impact statement (DEIS) discussion of spent fuel transportation risk relative to the proposed Skull Valley, Utah 10 C.F.R. Part 72 independent spent fuel storage installation (ISFSI) of Applicant Private Fuel Storage, L.L.C. (PFS). Now pending with the Licensing Board is a November 10, 2000 State motion for partial reconsideration of that determination,

in particular, our finding that under the first section 2.714(a)(1) element the State lacked good cause for its late-filing.¹ Both PFS and the Staff oppose the State's reconsideration request.

We deny the State's reconsideration motion for the reasons set forth below. As we have noted elsewhere in this proceeding:

A properly supported reconsideration motion is one that does not rely upon (1) entirely new theses or arguments, except to the extent it attempts to address a presiding officer's ruling that could not reasonably have been anticipated, *see Louisiana Energy Services, L.P.* (Claiborne Enrichment Center), CLI-97-2, 45 NRC 3, 4 & n.1 (1997) (citing cases); or (2) previously presented arguments that have been rejected, *see Nuclear Engineering Co.* (Sheffield, Illinois Low-Level Radioactive Waste Disposal Site), CLI-80-1, 11 NRC 1, 5 (1980). Instead, the movant must identify errors or deficiencies in the presiding officer's determination indicating the questioned ruling overlooked or misapprehended (1) some legal principle or decision that should have controlling effect; or (2) some critical factual information. *See Georgia Power Co.* (Vogtle Electric Generating Plant, Units 1 and 2), LBP-94-31, 40 NRC 137, 140 (1994); *Philadelphia Electric Co.* (Limerick Generating Station, Units 1 and 2), LBP-83-25, 17 NRC 681, 687, *rev'd and remanded on other grounds*, ALAB-726, 17 NRC 755 (1983). Reconsideration also may be appropriately sought to have the presiding officer correct what appear to be inharmonious rulings in the same decision. *See LBP-98-10*, 47 NRC 288, 296 (1998).

LBP-98-17, 48 NRC 69, 73-74 (1998). Invoking the overlooked/misapprehended legal principle or decision aspect of this standard, the crux of the State's argument is that the Board failed to give sufficient credence to Commission policies regarding the application of the late-filing criteria so as to render its determination "an unwarranted and excessive sanction." [State] Motion for Partial Reconsideration of LBP-00-28 (Nov. 10, 2000) at 3. Referencing an agency brief filed in a 1990 federal appellate case that indicates presiding officers have applied the late-filing test "generously"; a 1981 Commission policy statement, CLI-81-8, discussing factors to be considered relative to the imposition of sanctions for party failures to meet obligations, including the importance of the issues raised; the 45-day comment period for DEIS public comments; and problems with the availability of the State's supporting witness and its counsel relative to the preparation of DEIS-related late-filed contentions Utah LL through Utah OO, the State maintains that the Board must reconsider and reverse its determination that the State's submission of these issues 6 days after the Board-established filing deadline did not provide the requisite good cause for late-filing under the first (and most important) section 2.714(a)(1) criterion. *See*

¹ Although the State also has pending with the Commission a November 10, 2000 request for interlocutory review of the LBP-00-28, that filing does not deprive this Board of jurisdiction to rule on this motion. *See* 10 C.F.R. § 2.786(b); *see also International Uranium (USA) Corp.* (White Mesa Uranium Mill), CLI-97-9, 46 NRC 23, 24, *reconsideration denied*, LBP-97-14, 46 NRC 55 (1997), *aff'd*, CLI-98-6, 47 NRC 116 (1998); *Houston Lighting and Power Co.* (Allens Creek Nuclear Generating Station, Unit 1), ALAB-630, 13 NRC 84, 85 (1981).

id. at 4-9 (citing Brief for Respondents, *Union of Concerned Scientists v. NRC*, No. 89-1617, at 41; *Statement of Policy on Conduct of Licensing Proceedings*, CLI-81-8, 13 NRC 452, 454 (1981); and 10 C.F.R. § 51.73).

The Board does not agree. We are well aware of the obligations and responsibilities placed upon us by the Commission, as reflected in both *Statement of Policy on Conduct of Adjudicatory Proceedings*, CLI-98-12, 48 NRC 18, 21 (1998), and CLI-81-8, and have sought to apply that guidance appropriately as the circumstances present themselves.² At issue in this instance is that aspect of the late-filed contentions' good cause factor that concerns the diligence with which the sponsoring party prepares and files an issue statement following the event or document that provides an appropriate "trigger" for such a submission. The time limit for submitting late-filed contentions relating to the Staff DEIS was delineated and, indeed, as we pointed out in our other October 30, 2000 ruling, was met by the State in providing another late-filed DEIS-related contention. *See* LBP-00-27, 52 NRC 216, 223 (2000). The State has not denied it failed to comply with that deadline in connection with these four issue statements, but reiterates that its supporting witness and counsel had other obligations that prevented them from completing the task of preparing and submitting these contentions within that time frame. What the State fails to explain, however, is why it failed to bring these concerns to the attention of the Board prior to the expiration of the deadline — as it clearly should have done. *See* Memorandum and Order (Initial Prehearing Order) (Sept. 23, 1997) at 6-7 (unpublished). As the Board's October 30 ruling reflects, consistent with the Commission's guidance cited above, this lack of diligence can and should be taken into account in determining whether good cause exists under late-filing factor one.

Thus, what the State describes as a "sanction" was, in fact, the Board's determination that relative to the first section 2.714(a)(1) late-filing factor, the State had failed to meet its burden of establishing good cause. And as to the other matters it now asserts require reconsideration, the only one that merits additional mention — the newly raised matter of the "significance" of these late-filed issues — is not one that requires further discussion in the context of the Board's section 2.714(a)(1) factor one good cause finding that is at the heart of the State's concern, *see* LBP-00-27, 52 NRC at 223; *see also* *Commonwealth Edison Co.* (Braidwood Nuclear Power Station, Units 1 and 2), CLI-86-8, 23 NRC 241, 248 (1986) (issue importance is a matter to be considered under section 2.714(a)(1) factor three), and, in any event, would not change the Board's overall findings relative to the ultimate balance that accrues under the five-factor test. We thus

²For instance, in this proceeding the Board previously declined to sustain a timeliness objection lodged against the State regarding a discovery matter, albeit with the admonition that it should not anticipate that the same result would obtain for similar future missteps. *See* Licensing Board Memorandum and Order (Ruling on Discovery Requests) (Mar. 10, 2000) at 11-13 (unpublished).

conclude that none of those matters requires alteration of the result reached by the Board in LBP-00-28.

For the foregoing reasons, it is, this twenty-eighth day of November 2000, ORDERED that the State's November 10, 2000 motion for partial reconsideration of LBP-00-28 is *denied*.

THE ATOMIC SAFETY AND
LICENSING BOARD³

G. Paul Bollwerk, III
ADMINISTRATIVE JUDGE

Dr. Jerry R. Kline
ADMINISTRATIVE JUDGE

Dr. Peter S. Lam
ADMINISTRATIVE JUDGE

Rockville, Maryland
November 28, 2000

³Copies of this Memorandum and Order were sent this date by Internet e-mail transmission to counsel for (1) Applicant PFS; (2) Intervenors Skull Valley Band of Goshute Indians, Ohngo Gaudadeh Devia, Confederated Tribes of the Goshute Reservation, Southern Utah Wilderness Alliance, and the State; and (3) the Staff.

UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

ATOMIC SAFETY AND LICENSING BOARD

Before Administrative Judge:

Charles Bechhoefer, Presiding Officer

In the Matter of

**Docket Nos. 50-333-LT
50-286-LT
(consolidated)
(ASLBP No. 01-785-02-LT)**

**POWER AUTHORITY OF THE
STATE OF NEW YORK and
ENERGY NUCLEAR FITZPATRICK LLC,
ENERGY NUCLEAR INDIAN
POINT 3 LLC, and
ENERGY NUCLEAR OPERATIONS, INC.
(James A. FitzPatrick Nuclear Power
Plant; Indian Point, Unit 3)**

November 30, 2000

In a license transfer proceeding subject to 10 C.F.R. Part 2, Subpart M, the Presiding Officer sets filing schedules and procedures to be followed in the proceeding, as prescribed by the Commission in CLI-00-22, 52 NRC 266 (2000).

**MEMORANDUM AND ORDER
(Filing Schedules and Procedures)**

This proceeding concerns the license transfers for the James A. FitzPatrick Nuclear Power Plant (FitzPatrick) and the Indian Point Nuclear Generating Unit No. 3 (Indian Point 3), from the Power Authority of the State of New York (PASNY) to Entergy Nuclear FitzPatrick LLC, Entergy Nuclear Indian Point 3

LLC, and Entergy Nuclear Operations, Inc. (collectively, Entergy). It is subject to the procedural requirements set forth in 10 C.F.R. Part 2, Subpart M — “Public Notification, Availability of Documents and Records, Hearing Requests and Procedures for Hearings on License Transfer Applications” (10 C.F.R. §§ 2.1300-2.1331).

I. BACKGROUND

By Memorandum and Order dated November 27, 2000, CLI-00-22, 52 NRC 266 (2000), the Nuclear Regulatory Commission (Commission or NRC) determined that three of the petitioners requesting a hearing — the Citizens Awareness Network (CAN), the Town of Cortlandt together with the Hendrick Hudson School District (collectively, Cortlandt), and the Nuclear Generation Employees Association together with William Carano, Thomas Pulcher, and Richard Wiese, Jr. (collectively, the Association) had demonstrated their standing and had proffered two admissible issues. (The two specific issues admitted by the Commission are set forth in CLI-00-22, 52 NRC at 319.) The Commission further permitted CAN and Cortlandt to file a revised issue following issuance of a protective order giving them access to the Applicants’ proprietary information. As described in CLI-00-22, the issues generally involve whether the Entergy companies “have demonstrated their financial ability to operate and maintain the plants safely and whether they have provided a reasonable assurance of adequate decommissioning funding.” CLI-00-22, 52 NRC at 286. In addition, the Commission granted the request of Westchester County (Westchester) to participate as a governmental participant (*see* 10 C.F.R. § 2.715(c)), with respect to the Indian Point 3 transfer. CLI-00-22, 52 NRC at 295.

CLI-00-22 also directed the Commission’s Chief Administrative Judge promptly to appoint a Presiding Officer for this proceeding. On November 28, 2000, the undersigned was so designated. As provided by 10 C.F.R. § 2.1309(b)(3), the Presiding Officer is responsible for certifying promptly the completed hearing record to the Commission without a recommended or preliminary decision.

In addition, CLI-00-22 described certain schedules and procedural requirements applicable to this proceeding. Among other matters, it set forth service by e-mail, supplemented by a paper-copy filing.

II. SUPPLEMENTARY DIRECTIONS

A. E-mail Service

CLI-00-22 specified the service list for this proceeding (52 NRC at 321-25). However, the attempted service by NRC of the document titled “Designation of

Presiding Officer'' revealed several addresses that were not recognized. Each participant should forward to the Presiding Officer (cxb2@nrc.gov) by 11:59 p.m. on December 7, 2000, its desired service list, including name of individual, party or group represented, mail address, telephone and fax numbers, and e-mail address.

B. Hard-Copy Service

CLI-00-22 required, in addition to e-mail service, service of a single hard copy of each filing to NRC's Office of the Secretary. In addition, to avoid misunderstandings resulting from the paging of electronic documents, the parties are requested also to serve hard copies on the Presiding Officer and on representatives of each of the other parties.

III. NOTICES OF APPEARANCE

CLI-00-22 directs each counsel or representative of each party, to the extent they had not already done so, to file not later than 11:59 p.m. on December 7, 2000, a notice of appearance complying with the requirements of 10 C.F.R. § 2.713(b). The Presiding Officer hereby requests each counsel to file such a notice, whether or not they had previously filed such notice with the Commission.

IV. SCHEDULES

To reiterate the schedules set forth in CLI-00-22, together with supplemental filings referenced above, the following schedules are hereby adopted for this proceeding:

December 7, 2000 (11:59 p.m.):

1. Filing of corrected service lists.
2. Filing of Notices of Appearance.

December 12, 2000 (11:59 p.m.):

1. Filing (as appropriate) by all parties of joint motion for hearing consisting of written comments. (Must be agreed to by all parties.)
2. Submission of joint protective order to Presiding Officer (or, alternatively, notification to Presiding Officer of inability of parties to agree on protective order).

December 27, 2000 (11:59 p.m.):

1. Filing of initial written statements of position and written direct testimony (together with supporting affidavits) on the two issues admitted in CLI-00-22. (If an additional issue is accepted following issuance of a protective order, the Presiding Officer will establish schedules for filings on such issue.)

January 2, 2001 (11:59 p.m.) or 20 days following entry of a protective order, if later:

1. Submission by CAN and/or Cortland of revised financial qualifications issue, challenging the Entergy companies' cost and revenue projections based, at least in part, on information obtained by intervenors from proprietary data. (If the Presiding Officer accepts such an issue, he will establish schedules for filings on that issue.)

January 16, 2000 (11:59 p.m.):

1. Submission of written responses to direct testimony, and rebuttal testimony (with supporting affidavits) on the two issues admitted by CLI-00-22.
2. Submission of proposed questions on written direct testimony on the two issues admitted in CLI-00-22.

January 26, 2001 (11:59 p.m.):

1. Submission of proposed questions directed to written rebuttal testimony.

February 2, 2001 (9:30 a.m.):

1. Assuming parties have not unanimously sought a hearing consisting of written comments, oral hearing is scheduled, beginning at 9:30 a.m. on February 2, 2001, at the ASLBP hearing room, TWFN, Rockville, Maryland. The hearing will be transcribed. Portions of this hearing may not be open to the public, if it is necessary to protect proprietary data from public disclosure. (*See* CLI-00-22, 52 NRC at 321.)

February 22, 2001 (11:59 p.m.):

1. Filing by parties and governmental participants of post-hearing statements of position.

The Presiding Officer expects to certify the record to the Commission, for its decision, during the week commencing with February 26, 2001, to enable the Commission to render a final decision by March 26, 2001 (as specified in CLI-00-22, 52 NRC 321).

IT IS SO ORDERED.

Charles Bechhoefer, Presiding Officer
ADMINISTRATIVE JUDGE

Rockville, Maryland
November 30, 2000

[Copies of this Memorandum and Order have been transmitted this date to counsel for or representatives of each party and governmental participant.]

UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

COMMISSIONERS:

Richard A. Meserve, Chairman
Greta Joy Dicus
Nils J. Diaz
Edward McGaffigan, Jr.
Jeffrey S. Merrifield

In the Matter of

Docket No. 72-22-ISFSI

PRIVATE FUEL STORAGE, L.L.C.
(Independent Spent Fuel Storage
Installation)

December 20, 2000

RULES OF PRACTICE: TIME FOR SEEKING REVIEW

SCOPE OF REVIEW OF PARTIAL INITIAL DECISION

In the interest of efficiency, all rulings that deal with the subject matter of the hearing from which a partial initial decision ensues should be reviewed by the Commission at the same time. Therefore, the time to ask the Commission's review of any claim that could have affected the outcome of a partial initial decision, including bases that were not admitted or that were dismissed prior to the hearing, is immediately after the partial initial decision is issued.

RULES OF PRACTICE: TIME FOR SEEKING REVIEW

Absent special circumstances, review of preliminary rulings unrelated to the partial initial decision must wait until either the Board considers the issue in a relevant partial initial decision or until the Board completes its proceedings, depending on the nature of the preliminary ruling.

MEMORANDUM

The State of Utah has requested clarification from the Commission on the scope and timing of petitions for review under 10 C.F.R. § 2.786(b). Because our regulations may be less than clear in the context of complex, multi-issue licensing proceedings such as the one under consideration here, we accept the invitation to clarify our appellate rules.

BACKGROUND

This proceeding involves the application by Private Fuel Storage, L.L.C., for a license to construct an independent spent fuel storage installation (ISFSI) on a site on the reservation of the Skull Valley Band of Goshute Indians in Tooele, Utah. Utah intervened in the proceeding and asserted a number of contentions.

The status of Utah's various contentions and underlying bases is quite complex. Some contentions were admitted for hearing, while others were not. In some cases, some bases for an asserted contention were admitted, while other bases for the same contention were not. As more information has become available during the course of the proceeding, Utah has filed additional, late contentions, some of which have been admitted while others have not. In addition, some contentions or bases have been dismissed under summary disposition procedures, while others have gone forward to a hearing.

Utah's Contention R, questioning the adequacy of PFS's Emergency Plan, is such a contention. Some bases were not admitted,¹ some were later dismissed pursuant to the Applicant's summary disposition motion,² and the remaining issues went forward to a hearing, which began June 19, 2000.

Utah asks whether the Presiding Officer's decisions rejecting or dismissing bases are ripe for Commission review when the Presiding Officer issues his partial initial decision after a hearing on the admitted bases of the same contention. Because whether an issue is properly considered a "basis" for a contention or a separate contention is not always clear (and sometimes bases and contentions are realigned in the course of litigation), we also consider the question whether the rejection or dismissal of a related contention is ripe after a partial initial decision.

¹ See LBP-98-7, 47 NRC 142, 195-96 (1998).

² See LBP-99-36, 50 NRC 202 (1999).

DISCUSSION

The regulatory provision in question, 10 C.F.R. § 2.786(b)(1), states that “[w]ithin fifteen (15) days after service of a full or partial initial decision by a presiding officer . . . a party may file a petition for review with the Commission on the grounds specified in paragraph (b)(4) of this section.” Section 2.786(b)(4) provides that the Commission will use its discretion to exercise review, “giving due weight to the existence of a substantial question with respect to [various] considerations,” including factual findings and legal conclusions. The regulations are somewhat unclear as to whether the “substantial question” for Commission review must be one raised specifically by the initial decision, or can be a question raised by a previous ruling, as where a basis for a contention was rejected.

Consistent with longstanding Commission practice, and, as a matter of both logic and efficiency, all rulings that deal with the subject matter of the partial initial decision should be reviewed at the same time.³ Therefore, the time to ask the Commission’s review of any claim that could have affected the outcome of the partial initial decision is immediately after the partial initial decision is issued. The parties should assert any claims of error that relate to the subject matter of the partial initial decision, whether the specific issue was admitted for the hearing or not, and without regard to whether the issue was originally designated a separate “contention” or a “basis” for a contention. Our holding is in harmony with the logical implications of 10 C.F.R. § 2.760(a) of the Commission’s Rules of Practice, under which an initial decision normally will constitute the final decision of the Commission forty (40) days from its issuance unless a petition for review is filed in accordance with 10 C.F.R. § 2.786, or the Commission directs otherwise.⁴ Our holding is also consistent with the practice of the now-defunct Appeal Board, which treated appeals from partial initial decisions as including preliminary related rulings, including rulings rejecting contentions. *See, e.g., Public Service Co. of New Hampshire* (Seabrook Station, Units 1 and 2), ALAB-875, 26 NRC 251 (1987).

Efficiency does not require the Commission to review orders dismissing contentions or bases (or other preliminary order) unrelated to the subject matter of the hearing on which the Licensing Board issued its partial initial decision.

³ An exception to this practice is review of matters already finally decided by the Commission in an interlocutory order.

⁴ Parties are reminded of these implications when presiding officers include in the partial initial decisions, pursuant to the directive in 10 C.F.R. § 2.760(d), the time within which a petition for review may be filed and the date when the initial decision may become final under the terms of 10 C.F.R. § 2.760(a).

Absent special circumstances,⁵ review of preliminary rulings unrelated to the partial initial decision must wait until either the Board considers the issue in a relevant partial initial decision or the Board completes its proceedings, depending on the nature of the preliminary ruling.

For the Commission

ANNETTE L. VIETTI-COOK
Secretary of the Commission

Dated at Rockville, Maryland,
this 20th day of December 2000.

⁵ PFS has asked us to adopt here the Appeal Board's standard allowing appeals of preliminary rulings that dispose of a "major segment of the case." See, e.g., *Public Service Co. of New Hampshire* (Seabrook Station, Units 1 and 2), ALAB-894, 27 NRC 632 (1988). In particular, PFS wants us to hold that the time for Utah to file an appeal of rulings dismissing various security-related contentions was triggered when Utah abandoned the last admitted security-related contention, thus wrapping up a major segment of the case. Because Utah may never file such an appeal, because this issue has not been briefed by the parties, and because there is no urgency (such as that caused by the impending partial initial decision on the hearing that took place in June), we decline the invitation to rule on this question.

UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

COMMISSIONERS:

Richard A. Meserve, Chairman
Greta Joy Dicus
Nils J. Diaz
Edward McGaffigan, Jr.
Jeffrey S. Merrifield

In the Matter of

Docket No. 50-423-LA-3
(Facility Operating
License NPF-49)

NORTHEAST NUCLEAR ENERGY
COMPANY
(Millstone Nuclear Power Station,
Unit 3)

December 21, 2000

This proceeding concerns the application of Northeast Nuclear Energy Company to increase the storage capacity of its spent fuel pool at its Millstone Nuclear Power Station, Unit 3. The Licensing Board denied the request of two intervenors, the Connecticut Coalition Against Millstone and the Long Island Coalition Against Millstone, for an evidentiary hearing, and the intervenors petitioned the Commission for review. The Commission remands the intervenors' motion to reopen to the Licensing Board and defers acting on the intervenors' motion to stay appellate proceedings.

**LICENSING BOARDS: REOPENING OF PROCEEDINGS;
JURISDICTION**

NUCLEAR REGULATORY COMMISSION: JURISDICTION

**RULES OF PRACTICE: JURISDICTION (LICENSING BOARDS);
MOTIONS TO REOPEN RECORD; REOPENING OF PROCEEDINGS
(BOARD JURISDICTION); APPELLATE REVIEW**

The Licensing Board lacks jurisdiction to consider a motion to reopen the record after a petition to review a final order has been filed. *See Philadelphia Electric Co.* (Limerick Generating Station, Units 1 and 2), ALAB-726, 17 NRC 755 (1983); *cf. Curators of the University of Missouri* (TRUMP-S Project), CLI-95-1, 41 NRC 71, 93-94 (1995).

MEMORANDUM AND ORDER

Northeast Nuclear Energy Company (“NNECO”) is seeking a license amendment to increase the storage capacity of its spent fuel pool from 756 assemblies to 1860 assemblies. The Connecticut Coalition Against Millstone (“CCAM”) and the Long Island Coalition Against Millstone (“CAM”) (collectively, “CCAM/CAM”) oppose the requested amendment. CCAM and CAM were granted standing as Intervenors and three of their contentions were admitted in a proceeding under 10 C.F.R. Part 2, Subpart K (10 C.F.R. §§ 2.1101-2.1117).¹ On October 26, 2000, the Licensing Board issued a Memorandum and Order that adopted an agreed-upon license condition, denied the request for an evidentiary hearing on other issues, and terminated the proceeding. *See* LBP-00-26, 52 NRC 181.

The Board ruled that there was no genuine dispute of fact or law meriting an evidentiary hearing regarding CCAM/CAM’s Contention 4, relating to the risk of criticality accidents because of increased reliance on controls CCAM/CAM deems administrative rather than physical. The Board also denied an evidentiary hearing as to Contention 6, a legal question relating to the use of administrative controls to prevent criticality in the spent fuel pool. CCAM/CAM has filed a joint petition for Commission review of LBP-00-26 concerning Contentions 4 and 6. They do not seek review of the Board’s decision, stemming from the third

¹ *See* LBP-00-2, 51 NRC 25 (2000). The Board admitted Contentions 4, 5, and 6 — all dealing with criticality questions — and rejected eight other contentions.

admitted contention, to adopt an agreed-upon license condition.² Both NNECO and the NRC Staff oppose the petition for review.

On December 18, 2000, CCAM/CAM filed a motion to stay appellate proceedings and a motion to reopen the record, based on recent reports of two fuel rods allegedly missing at NNECO's Millstone Unit 1. CCAM/CAM seeks primarily to develop the record further as to Contention 4. Notwithstanding the Board's termination of proceedings before it,³ we expressly remand the motion to reopen to the Board for its consideration in the first instance, given the Board's greater familiarity with the record in this case.⁴ We will await responses to the motion for a stay of appellate proceedings before acting on that motion.

For the foregoing reasons, the Commission *remands* CCAM/CAM's motion to reopen to the Licensing Board for disposition.

IT IS SO ORDERED.

For the Commission

ANNETTE L. VIETTI-COOK
Secretary of the Commission

Dated at Rockville, Maryland,
this 21st day of December 2000.

²The agreed-upon license condition provides that soluble boron concentration in the spent fuel pool be maintained at greater than or equal to 800 parts per million (ppm) whenever fuel assemblies are present. In addition, verification of the boron concentration is required every 7 days. See LBP-00-26, 52 NRC at 201.

³The Board lacks jurisdiction to consider a motion to reopen after a petition to review a final order has been filed. See *Philadelphia Electric Co.* (Limerick Generating Station, Units 1 and 2), ALAB-726, 17 NRC 755 (1983); cf. *Curators of the University of Missouri* (TRUMP-S Project), CLI-95-1, 41 NRC 71, 93-94 (1995). Although CCAM/CAM improperly filed its motion to reopen with the Board, we will treat the motion as though it had been correctly filed with the Commission.

⁴Regarding responses to the motion to reopen, the parties shall meet the filing schedule set by the Board in its December 19, 2000 order; however, they need not address the jurisdiction issue, which is resolved, *supra*.

UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

ATOMIC SAFETY AND LICENSING BOARD

Before Administrative Judges:

Thomas S. Moore, Presiding Officer
Richard F. Cole, Special Assistant

In the Matter of

Docket No. 40-3453-MLA-3
(ASLBP No. 99-761-04-MLA)

MOAB MILL RECLAMATION TRUST
(Moab, Utah)

December 20, 2000

ORDER

In *Atlas Corp.* (Moab, Utah), LBP-00-4, 51 NRC 53 (2000), the Presiding Officer found that the Petitioners, Grand Canyon Trust et al., had standing to intervene and had proffered germane areas of concern so that they were entitled to be admitted as parties in this informal 10 C.F.R. Part 2, Subpart L materials license amendment proceeding to modify the reclamation plan for the 130-acre Moab Mill tailings pile. That uranium mill tailings pile is situated on the west bank of the Colorado River in Grant County, Utah, near the town of Moab. The background of the proceeding is recited in LBP-00-4, as well as in an earlier unpublished October 28, 1999 Memorandum and Order. Since admitting the Petitioners as parties, the Presiding Officer, at the request of all the parties, ordered the proceeding held in abeyance while the parties conducted several rounds of settlement negotiations, awaited various rulings in related federal court litigation involving many of the same issues and parties, and awaited final congressional action on pending legislation dealing with the Moab Mill site.

At a telephone status conference on November 17, 2000, the Petitioners indicated that they now wished to move to withdraw their intervention petition in light of the recently enacted National Defense Authorization Act for Fiscal

Year 2001, Public Law 106-398. The Trustee for the Moab Mill Reclamation Trust and the NRC Staff supported the Petitioners' motion. Tr. at 8-9. Thereafter, on December 13, 2000, the Petitioners filed a written motion to withdraw their intervention petition, stating (at 1):

The Congress has enacted legislation that requires the transfer of the Moab Mill site from the Nuclear Regulatory Commission to the Department of Energy. Because the NRC license at issue in this case will be terminated and jurisdiction over the site will no longer reside with the NRC, the groundwater contamination issues that are the subject of the Grand Canyon Trust's intervention petition are no longer going to be addressed in the context of the NRC license. As a result, the Grand Canyon Trust seeks to withdraw its intervention petition and terminate these proceedings.

The Petitioners' motion to withdraw is *granted* and, because there are no other intervenors admitted to the proceeding, this proceeding is hereby *terminated*. It is so ORDERED.

By the Presiding Officer

Thomas S. Moore
ADMINISTRATIVE JUDGE

Rockville, Maryland
December 20, 2000

UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

ATOMIC SAFETY AND LICENSING BOARD

Before Administrative Judge:

Charles Bechhoefer, Presiding Officer

In the Matter of

**Docket Nos. 50-333-LT
50-286-LT
(consolidated)
(ASLBP No. 01-785-02-LT)**

**POWER AUTHORITY OF THE
STATE OF NEW YORK and
ENERGY NUCLEAR FITZPATRICK LLC,
ENERGY NUCLEAR INDIAN
POINT 3 LLC, and
ENERGY NUCLEAR OPERATIONS, INC.
(James A. FitzPatrick Nuclear Power
Plant; Indian Point, Unit 3)**

December 22, 2000

In a license-transfer proceeding governed by 10 C.F.R. Part 2, Subpart M, the Presiding Officer approves the requested withdrawal with prejudice of the Town of Cortlandt, New York, and the Hendrick Hudson School District (collectively, Intervenor), as well as the dismissal of the issue raised solely by those Intervenor.

RULES OF PRACTICE: CONSIDERATION OF ISSUES

Where an intervenor withdraws from a proceeding with prejudice, an issue sponsored solely by that intervenor is also dismissed, but without prejudice.

MEMORANDUM AND ORDER

(Approving Withdrawal of Cortlandt/Hendrick Hudson School District)

On December 15, 2000, the Town of Cortlandt, New York, and the Hendrick Hudson School District (collectively, Cortlandt), Intervenors in this 10 C.F.R. Part 2, Subpart M License-Transfer proceeding, filed a Notice of Withdrawal, seeking to withdraw from this proceeding with prejudice their request for a hearing and petition for leave to intervene, together with the issue raised by them — i.e., the first issue admitted by CLI-00-22, 52 NRC 266 (2000), concerning, in Cortlandt's words, "Entergy Indian Point's liability for certain financial obligations of Entergy FitzPatrick." For the reasons that follow, the Presiding Officer *approves* both the withdrawal of Cortlandt as well as the dismissal of the issue raised solely by them.

In a response dated December 18, 2000, the Licensees urged that the Presiding Officer "promptly accept and approve Cortlandt's withdrawal and that all the issues raised by Cortlandt in this proceeding, and particularly Issue 1 as set forth in CLI-00-22, should be promptly dismissed." In support, the Licensees cite, *inter alia*, *Houston Lighting & Power Co.* (South Texas Project, Units 1 and 2), ALAB-799, 21 NRC 360, 382-83 (1985):

Where there is more than one intervenor in a case, the withdrawal of one . . . serve[s] to remove the withdrawing party's contentions from litigation. The Commission has made it clear, in this regard, that the mere acceptance of contentions at the threshold stage does not turn them into cognizable issues for litigation independent of their sponsoring intervenor.

Id. (footnotes omitted). The Licensees further add that my acceptance of Cortlandt's withdrawal and dismissal of its contention is consistent with the Commission's expressed desire in CLI-00-22 for the parties to attempt to settle their issues amicably.

On the other hand, CAN, an Intervenor, in a response dated December 18, 2000, does not object to Cortlandt's withdrawal, as such, but reads CLI-00-22 as permitting the litigation of Cortlandt's Issue 1 by any of the intervenors or interested governmental entities. It cites CLI-00-22's direction to the "*parties* to organize their presentations . . . around the following two issues" (52 NRC at 319, emphasis supplied), together with CLI-00-22's direction that "[t]he *parties*' filings and arguments must be confined to the contours of these *two* issues (*id.*, emphasis supplied). The Licensees, on December 20, 2000, filed a reply to CAN's response concerning the continuing litigability of the issue sponsored solely by Cortlandt, emphasizing their view that nothing in CLI-00-22 overrides the general NRC precedent that would require dismissal of the issue sponsored solely by the withdrawing party.

The Presiding Officer does not read the portions of CLI-00-22 cited by CAN as obviating the general NRC precedent to the effect that, when an intervenor withdraws, its issues are also withdrawn. Accordingly, the Presiding Officer is approving the withdrawal, with prejudice, requested by the Town of Cortlandt and the Hendrick Hudson School District, and the dismissal of their contention. I note, however, that although the requested withdrawal is with prejudice, the dismissal of Contention 1 does not constitute an adjudication on the merits of that contention. As pointed out in *South Texas, supra*, further consideration by the Presiding Officer (there, an Atomic Safety and Licensing Board) of the dismissed contention, should another party seek to litigate it, would require a balancing of the factors applicable to late-filed contentions. See *Private Fuel Storage, L.L.C.* (Independent Spent Fuel Storage Installation), LBP-99-6, 49 NRC 114 (1999). Further, the circumstance that an intervenor is permitted to participate in litigation of another intervenor's issues, e.g., through cross-examination, "does not elevate the [first] intervenor's status to that of a co-sponsor of the contentions." *South Texas, ALAB-799, supra*, 21 NRC at 382-83.

In light of the foregoing, the request for withdrawal of the Town of Cortlandt and the Hendrick Hudson School District, with prejudice, is hereby *granted*. The contention submitted by them is hereby *dismissed*, without prejudice.

IT IS SO ORDERED.

Charles Bechhoefer, Presiding Officer
ADMINISTRATIVE JUDGE

Rockville, Maryland
December 22, 2000

[Copies of this Memorandum and Order have been e-mailed or telefaxed this date to counsel for, or representatives of, each of the parties and participating governmental entities.]

UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

ATOMIC SAFETY AND LICENSING BOARD

Before Administrative Judges:

G. Paul Bollwerk, III, Chairman
Dr. Jerry R. Kline
Dr. Peter S. Lam

In the Matter of

Docket No. 72-22-ISFSI
(ASLBP No. 97-732-02-ISFSI)

PRIVATE FUEL STORAGE, L.L.C.
(Independent Spent Fuel Storage
Installation)

December 29, 2000

In this 10 C.F.R. Part 72 proceeding concerning the application of Private Fuel Storage, L.L.C. (PFS), for a license to construct and operate an independent spent fuel storage installation (ISFSI) on the reservation of the Skull Valley Band of Goshute Indians in Skull Valley, Utah, the Licensing Board rules in favor of PFS regarding contention Utah R, Emergency Plan, the challenge of Intervenor State of Utah (State) to the adequacy of the PFS emergency plan onsite fire protection measures.

RULES OF PRACTICE: EXPERT WITNESS(ES)

When the qualifications of a witness are challenged, the party sponsoring the witness has the burden of demonstrating his or her expertise. *See Pacific Gas and Electric Co.* (Diablo Canyon Nuclear Power Plant, Units 1 and 2), ALAB-410, 5 NRC 1398, 1405 (1977). The qualifications of an expert can be established by showing relevant knowledge, skill, experience, training, or education. *See Duke Power Co.* (William B. McGuire Nuclear Station, Units 1 and 2), ALAB-669, 15 NRC 453, 474-75 (1982) (citing Fed. R. Evid. 702).

ATOMIC ENERGY ACT: SAFETY FINDINGS

NRC: HEALTH AND SAFETY RESPONSIBILITIES; RESPONSIBILITIES UNDER AEA; ADJUDICATORY RESPONSIBILITIES

The scope of NRC regulatory authority does not extend to all questions of fire safety at licensed facilities; instead, the scope of agency regulatory authority with respect to fire protection is limited to the hazards associated with nuclear materials. Thus, while the agency's radiological protection responsibility requires it to consider questions of fire safety, this does not convert the agency into the direct enforcer of local codes, Occupational Safety and Health Administration regulations, or national standards on fire, occupational, and building safety that it has not incorporated into its regulatory scheme. *See Curators of the University of Missouri*, CLI-95-8, 41 NRC 386, 393 (1995); *see also Curators of the University of Missouri*, CLI-95-1, 41 NRC 71, 159 (1995).

NRC: AUTHORITY (IMPOSITION OF REQUIREMENTS)

Only statutes, regulations, orders, and license conditions can impose requirements on applicants and licensees. *See Curators of the University of Missouri*, CLI-95-1, 41 NRC at 98, 150.

RULES OF PRACTICE: REGULATORY ASSUMPTION

In the absence of evidence to the contrary, a presiding officer will not presume that an applicant or licensee, and those who work for them, will not adhere to applicable regulations or standards. *See General Public Utilities Nuclear Corp.* (Oyster Creek Nuclear Generating Station), LBP-96-23, 44 NRC 143, 164 (1996).

EMERGENCY PLAN(S): CONTENT (IMPLEMENTING PROCEDURES)

Emergency planning implementing procedures — the how-to and what-to-do details of the plan — should not become the focus of the adjudicatory process. *See Louisiana Power and Light Co.* (Waterford Steam Electric Station, Unit 3), ALAB-732, 17 NRC 1076, 1106-07 (1983); *see also Curators of the University of Missouri*, CLI-95-1, 41 NRC at 140-42 (asserted failure of emergency plan to identify response team individuals' responsibilities and describe firefighting training seeks unnecessary level of detail).

LICENSE CONDITIONS: STANDARDS FOR IMPOSING

Relative to technical specification conditions for power reactor licenses, the Appeal Board has observed:

technical specifications are to be reserved for those matters as to which the imposition of rigid conditions or limitations upon reactor operation is deemed necessary to obviate the possibility of an abnormal situation or event giving rise to an immediate threat to the public health and safety.

Portland General Electric Co. (Trojan Nuclear Plant), ALAB-531, 9 NRC 263, 273 (1979) (footnote omitted). While this suggests that the threshold for imposing a technical license condition is not insignificant, in other contexts, in particular financial qualification matters, Commission rulings indicate that the threshold may be somewhat lower. See *CLI-00-13*, 52 NRC 23, 32 (2000) (adopting as ISFSI license conditions PFS financial qualification commitments made during the licensing process); *Louisiana Energy Services, L.P.* (Claiborne Enrichment Center), CLI-97-15, 46 NRC 294, 308-09 (1997) (adopting as enrichment facility license conditions financial qualification commitments made in applicant pleadings).

LICENSE CONDITIONS: STANDARDS FOR IMPOSING

When statements in applicant's proposed findings, which are based on applicant statements by witnesses under oath before the presiding officer or as part of its application, indicate a willingness to comply with all or a portion of specific, nationally recognized consensus standards, little purpose would be served in repeating the terms of these commitments as license conditions (or as presiding officer directives, see *Commonwealth Edison Co.* (Zion Station, Units 1 and 2), ALAB-616, 12 NRC 419, 423-24 (1980) (although matters are not worthy of technical specification, Board will incorporate commitments in its order to make them formally enforceable)). The penalties that flow from making false statements to a presiding officer and the NRC Staff, including the possibility of criminal violations under 18 U.S.C. § 1001 and agency enforcement actions, appear sufficient in this instance to ensure compliance without the additional step of incorporating into this decision a list of commitments that an applicant has clearly acknowledged it accepts and will fulfill. See *Florida Power & Light Co.* (Turkey Point Nuclear Generating Plant, Units 3 and 4), ALAB-898, 28 NRC 36, 41 n.20 (1988) (no need to incorporate applicant commitment into order given potential Staff enforcement).

TECHNICAL ISSUES DISCUSSED

The following technical issues are discussed: emergency plan(s), fire protection measures.

FIRST PARTIAL INITIAL DECISION (Contention Utah R, Emergency Plan)

I. INTRODUCTION

1.1 In June 1997, Private Fuel Storage, L.L.C., (PFS) filed an application with the NRC seeking authorization to construct and operate an independent spent fuel storage installation (ISFSI) on the Skull Valley, Utah reservation of the Skull Valley Band of Goshute Indians (Skull Valley Band). The purpose of this facility is to store spent nuclear fuel (SNF) created at commercial nuclear power reactors temporarily until a proposed permanent storage facility becomes available. This first partial initial decision presents the Licensing Board's findings of fact and conclusions of law relative to admitted contention Utah R, Emergency Plan, contesting the effectiveness of the onsite fire protection measures proposed by PFS for its Skull Valley ISFSI facility.

1.2 For the reasons set forth below, the Board finds that, in the face of the challenge of Intervenor State of Utah (State) as reflected in contention Utah R, PFS has sustained its burden of proof to demonstrate that the Skull Valley ISFSI complies with the applicable emergency planning requirements set forth in 10 C.F.R. § 72.32(a) so as to protect adequately the safety and health of onsite employees and the public at large relative to fire protection matters. Therefore, the Board concludes that the State's contention Utah R challenge to the PFS license application cannot be sustained.

II. PROCEDURAL BACKGROUND

2.1 Following the June 1997 submission by PFS of its application for a 20-year license for its proposed Skull Valley ISFSI facility, in response to a July 21, 1997 notice of opportunity for a hearing published in the *Federal Register*, 62 Fed. Reg. 41,099 (1997), a number of entities, including the State, filed petitions to intervene in any adjudicatory proceeding challenging the PFS license application. Noting its opposition to the application, the State requested that it be admitted to the proceeding as a party pursuant to 10 C.F.R. § 2.714(a). *See* [State] Request for Hearing and Petition for Leave to Intervene (Sept. 11, 1997) at 1. In response to these intervention requests, the Board issued an

initial prehearing order on September 23, 1997, establishing an October 24, 1997 deadline for the submission of supplements to the hearing/intervention requests, including the filing of contentions and their supporting bases. *See* Licensing Board Memorandum and Order (Initial Prehearing Order) (Sept. 23, 1997) at 2-3 (unpublished). Subsequently, in response to party requests, the Board issued a series of orders that provided a 30-day extension of this filing period as well as set dates for a site visit and a prehearing conference for the week of January 26, 1998. *See* Licensing Board Memorandum and Order (Schedule for Prehearing Conference/Site Visit and Responses to Supplemental Petition) (Oct. 24, 1997) at 1 (unpublished); Licensing Board Memorandum and Order (Ruling on Motions to Suspend Proceeding and for Extension of Time to File Contentions) (Oct. 17, 1997) at 11 (unpublished). Thereafter, the State filed its supplemental petition, including contention Utah R, to which PFS and the Staff subsequently filed timely responses. *See* State Contentions on the Construction and Operating License Application by [PFS] for an [ISFSI] (Nov. 23, 1997) at 16-22; [PFS] Answer to Petitioners' Contentions (Dec. 24, 1997) at 215-36; NRC Staff's Response to Contentions Filed by [State] (Dec. 24, 1997) at 40-49; *see also* [State] Reply to the NRC Staff's and [PFS] Responses to [State] Contentions A through DD (Jan. 16, 1998) at 66-69.

2.2 On January 26, 1998, accompanied by the potential parties to the proceeding, the Board visited Tooele County, Utah, including the PFS site and other potentially relevant areas outside of the site, such as a proposed intermodal transfer point (ITP) at an interstate highway interchange near Rowley Junction, Utah, some distance to the north of the Skull Valley Band reservation, and the United States Army's Dugway Proving Grounds, which is to the south of the Skull Valley Band reservation. The Board then conducted a 3-day prehearing conference in Salt Lake City, Utah, during which it heard participant arguments regarding standing and the admissibility of submitted contentions. *See* Tr. at 1-835. Thereafter, in its ruling on the State's standing and its contentions, recognizing that the proposed PFS facility would be located wholly within the borders of Utah, the Board found the State's asserted interests in the health and safety of its citizens living, working, and traveling near the proposed ISFSI and its associated SNF transportation routes were sufficient to satisfy the necessary elements to establish its standing as a party in this proceeding. *See* LBP-98-7, 47 NRC 142, 169, *reconsideration granted in part and denied in part on other grounds*, LBP-98-10, 47 NRC 288, *aff'd on other grounds*, CLI-98-13, 48 NRC 26 (1998). Moreover, as is pertinent here, the Board admitted contention Utah R. *See* LBP-98-7, 47 NRC at 196.

2.3 In its original form as set forth in the State's intervention petition supplement, contention Utah R provided:

UTAH R — Emergency Plan

CONTENTION: The Applicant has not provided reasonable assurance that the public health and safety will be adequately protected in the event of an emergency at the storage site, at the transfer facility, or offsite during transportation in that:

1. PFS has not adequately described the facility, the activities conducted there, or the area in sufficient detail to evaluate the adequacy and appropriateness of the emergency plan, nor has PFS considered specific impediments to emergency response such as flooding, ice, snow, etc.
2. PFS has not identified adequate emergency and medical facilities and equipment to respond to an onsite emergency.
 - a. Tooele County capabilities and equipment are not addressed adequately.
 - b. No provision for extra onsite preparedness giving time for Tooele County to respond, particularly in adverse weather conditions.
3. The plan was not adequately coordinated with the State or other government (local, county, state, federal) agencies.
 - a. PFS has not supported its claim regarding absence of extremely hazardous substances and that no assistance will be required external to Tooele County.
 - b. PFS does not address transportation accidents or accidents at the intermodal transfer point.
4. PFS has not adequately described means and equipment for mitigation of accidents, because it:
 - a. Does not address how it would procure a crane within 48 hours for a tip over cask accident.
 - b. Does not adequately support capability to fight fires.
5. The Emergency Plan does not provide adequate detail to meet provisions of Reg. Guide 3.67, § 5.4.1 regarding equipment inventories and locations.

Id. at 195-96.

2.4 In ruling on the admissibility of this contention, the Board held (1) paragraph one and subparagraph b of paragraph three were admitted to the degree they related to the ITP; (2) subparagraph b of paragraph four relating to onsite firefighting capabilities was admitted in that it reflected a genuine material dispute so as to warrant further inquiry by the Board; (3) all other sections of paragraphs one, two, subparagraph a of paragraphs three and four, and paragraph five in its entirety, were found to be inadmissible in that they (a) presented no issue of genuine factual dispute; (b) impermissibly challenged the Commission's regulations or generic rulemaking-associated determinations, including Commission determinations relating to the need for offsite emergency response plans for ISFSIs; (c) lacked materiality; (d) lacked factual or expert

opinion support; and/or (e) failed adequately to challenge the PFS license application. *See id.* at 196.

2.5 To reflect this ruling in its April 1998 decision, the Board set forth a revised contention Utah R that read:

UTAH R — Emergency Plan

CONTENTION: The Applicant has not provided reasonable assurance that the public health and safety will be adequately protected in the event of an emergency at the storage site or the transfer facility in that:

1. PFS has not adequately described the ITP, the activities conducted there, or the area near the ITP in sufficient detail to evaluate the adequacy and appropriateness of the emergency plan.
2. PFS does not address response action, emergency information dissemination, or emergency response training programs for accidents at the ITP.
3. PFS has not adequately described the means and equipment for mitigation of accidents because it does not have adequate support capability to fight fires onsite.

Id. at 254. The Board followed with a notice of hearing recognizing that the State and other participants had standing and litigable contentions (such as the admitted portion of contention Utah R) that entitled them to party status in this proceeding. *See* 63 Fed. Reg. 23,476 (1998).

2.6 Thereafter, in accordance with the Board's order admitting parties and contentions and scheduling stipulations between the parties, *see, e.g.*, LBP-98-7, 47 NRC at 244-45; Licensing Board Memorandum and Order (General Schedule for Proceeding and Associated Guidance) (June 29, 1998) at 5-8 & attach. A (unpublished), the parties conducted discovery on this and other contentions. PFS then filed motions for summary disposition on various contentions, including one relating to the application of Part 72 standards to the Rowley Junction ITP and another seeking summary disposition on the balance of contention Utah R. Although the Board denied the PFS request for summary disposition on contention Utah R, *see* LBP-99-36, 50 NRC 202, 209 (1999), in a decision dated September 20, 1999, the Board granted summary disposition on those portions of contention Utah R relating to the ITP. *See* LBP-99-39, 50 NRC 232 (1999). Therefore, the only portion of contention Utah R (as admitted by the Board) that remained to be litigated was paragraph three.

2.7 By order dated February 2, 2000, the Board published a revised schedule that set June 19, 2000, as the beginning of an evidentiary hearing on contention Utah R, as well as two other safety contentions, Utah E/Confederated Tribes F, Financial Assurance, and Utah S, Decommissioning, with findings of fact and conclusions of law on these issues to be filed on or before July 31, 2000. *See* Licensing Board Order (General Schedule Revision and Other Matters) (Feb. 2, 2000), attach. A (unpublished). On April 19, 2000, the Board issued a notice of

hearing relative to this evidentiary proceeding along with notice of an opportunity to make oral or written limited appearance statements. *See* 65 Fed. Reg. 24,230 (2000), as revised, 65 Fed. Reg. 37,184 (2000). In accordance with this notice, evidentiary hearings were held in Salt Lake City, Utah, on June 19-22, 2000, and on June 27, 2000. Witnesses testified on behalf of PFS, the Staff, and the State regarding contention Utah R on June 19, 2000. *See* Tr. at 1383-668.

2.8 Referencing a July 20, 2000 letter from Staff counsel regarding a possible change in the status of Regulatory Guide 3.67, a Staff guidance document upon which the State, in part, based its contention Utah R arguments concerning the sufficiency of PFS emergency planning firefighting efforts, on July 21, 2000, the State requested an extension of time to file its proposed findings of fact and conclusions of law. *See* [State] Request for an Extension of Time to File Findings of Fact and Conclusions of Law on Contention Utah R (July 21, 2000); *see also* Letter to Licensing Board from Sherwin E. Turk, NRC Staff Counsel (July 20, 2000) [hereinafter Turk Letter]. By order dated July 24, 2000, the Board extended the filing date. *See* Order (Ruling on Extension Motion) (July 24, 2000) (unpublished). Although the Staff chose to comply with the original July 31 deadline, PFS and the State timely filed their respective pleadings on August 7, 2000. *See* NRC Staff's Proposed Findings of Fact and Conclusions of Law Concerning Contentions Utah R (Emergency Planning) and Utah S (Decommissioning Funding) (July 31, 2000) [hereinafter Staff Findings]; [PFS] Proposed Findings of Fact and Conclusions of Law on Contention Utah R (Aug. 7, 2000) [hereinafter PFS Findings]; [State] Proposed Findings of Fact and Conclusions of Law Regarding Contention Utah R, [PFS] Capability to Fight Fires Onsite (Aug. 7, 2000) [hereinafter State Findings]. On August 28, 2000, PFS, the State, and the Staff also filed responses to the other parties' proposed findings of fact and conclusions of law, including contention Utah R. *See* [PFS] Reply to the Proposed Findings of Fact and Conclusions of Law of the [State] and the NRC Staff on Contentions Utah E/Confederated Tribes F, Utah R, and Utah S (Aug. 28, 2000) [hereinafter PFS Response]¹; [State] Proposed Response Findings of Fact and Conclusions of Law Relating to Contention Utah R (Aug. 28, 2000) [hereinafter State Response]; NRC Staff's Reply Findings of Fact and Conclusions of Law Concerning Contention Utah R (Emergency Planning) (Aug. 28, 2000) [hereinafter Staff Response].

2.9 Also related to the parties' proposed finding filings regarding contention Utah R is an August 1, 2000 Commission ruling on a previous interlocutory Board referral, pursuant to 10 C.F.R. § 2.730(f), of a Board March 2000 summary disposition ruling on a financial qualifications issue, contention Utah E/Confederated Tribes F, Financial Assurance. *See* CLI-00-13, 52 NRC 23 (2000),

¹ Although parts of this response were filed as nonpublic, proprietary information, we refer only to the publicly available portions of this pleading.

aff'g in part and rev'g in part, LBP-00-6, 51 NRC 101 (2000). Given the possible impact of this decision on the pending evidentiary hearing on financial assurance issues, the Board ordered the parties to provide a submission, due at the same time as their proposed finding responses, addressing how the decision impacted the PFS proceeding with regard to the pending determinations on contentions Utah E/Confederated Tribes F and Utah S. *See* Licensing Board Order (Scheduling and Administrative Matters) (Aug. 4, 2000) (unpublished). Although PFS and the Staff elected to provide their discussions in their responses regarding the other parties' proposed findings of fact and conclusions of law relating to contention Utah E/Confederated Tribes F, *see* PFS Response at 3-4, 9-14; NRC Staff's Proposed Findings in Reply to the [State] Proposed Findings Concerning Contentions Utah S and Utah E/Confederated Tribes F (Aug. 28, 2000) at 39-41, and the State submitted its discussion on the financial qualification issues as a separate document, *see* [State] Discussion of the Impact of CLI-00-13 on Proposed Findings of Fact and Conclusions of Law Relating to Contentions Utah E/Confederated Tribes F and Utah S (Aug. 28, 2000), in its contention Utah R findings response the State asserted the Board should interpret this Commission financial qualifications decision to require that all PFS emergency commitments regarding fire protection matters should be incorporated as conditions into any license issued for the Skull Valley facility, *see* State Response at 5-6. Subsequently, when the Board afforded all the parties an opportunity to respond to the other parties' discussions regarding the impact of CLI-00-13, *see* Licensing Board Order (Granting Motion for Leave to File Reply and Permitting Additional Filings on Impact of CLI-00-13) (Sept. 1, 2000) (unpublished), PFS and the Staff addressed, among other things, the State's assertions regarding the application of CLI-00-13 to contention Utah R. *See* [PFS] Response to the [State] and NRC Staff's Filings Regarding the Impact of Commission Decision CLI-00-13 (Sept. 11, 2000) at 8-9 [hereinafter PFS CLI-00-13 Response]; NRC Staff's Response to the [State] Comments Concerning the Impacts of CLI-00-13 (Sept. 11, 2000) at 4-7 [hereinafter Staff CLI-00-13 Response].

III. PARTIES' POSITIONS ON CONTENTION UTAH R

3.1 As noted above, the only part of contention Utah R that was the subject of the June 2000 evidentiary hearing was paragraph three, as admitted by the Licensing Board in its April 1998 ruling on the standing and contentions of parties. Evidence regarding that matter was heard by the Board on June 19, 2000, in Salt Lake City, Utah, where it received the testimony of several witnesses. Below, we outline the positions of the parties relative to the evidence presented at the hearing.

A. Witness Qualifications

3.2 During the portion of the June 2000 hearing that concerned contention Utah R, PFS presented two witnesses in support of its application, Mr. Kenneth Dungan and Mr. Wayne Lewis, both of whom are engineers for PFS. The Staff also presented two witnesses, Mr. Paul Lain and Mr. Randolph Sullivan. The single witness presented by the State was Mr. Gary Wise, the current State Fire Marshal of Utah. An initial controversy among the parties is over the weight to be given to the testimony of the witnesses, particularly the State's sole witness, relative to the various fire protection matters in controversy. Below, we set forth the parties' positions regarding the qualifications of the various witnesses.

1. PFS Witnesses Dungan and Lewis

3.3 The two witnesses PFS presented on contention Utah R were Mr. Kenneth Dungan, a fire protection engineer working as a PFS contractor, and Mr. Donald Lewis, the PFS project lead mechanical engineer. PFS asserts that, based on their background and experience, these witnesses were more qualified than the State's witness to make such an assessment regarding the adequacy of the PFS emergency plan. *See* PFS Findings at 4.

3.4 According to the evidence presented, Mr. Dungan has been practicing in the field of fire protection engineering for nearly 30 years. He earned a bachelor's degree from the University of Maryland in chemical and fire protection engineering in 1971, followed by a master's degree from the University of Tennessee in environmental engineering in 1977. Mr. Dungan, a licensed professional engineer in Tennessee and Pennsylvania, has authored or co-authored more than a dozen articles on fire protection matters, taught college-level courses on the subject, and is a fellow and past president of the Society of Fire Protection Engineers. His professional experience in the fire protection field includes hazards analysis, risk assessment, emergency planning, design, and research and testing. He also has firefighting experience both as a volunteer and with industrial brigades and in fire brigade training and prefire planning. Mr. Dungan formerly was employed by a United States Department of Energy (DOE) contractor working in the insurance and consulting areas. In 1995, he co-founded Risk Technologies, L.L.C., which provides consulting services for clients needing fire protection, safety, and industrial hygiene advice. Mr. Dungan and his firm have contracted with PFS to advise the Applicant regarding the emergency plan for the Skull Valley ISFSI. *See* Testimony of Ken Dungan and Wayne Lewis on Fire Protection at the [Private Fuel Storage Facility (PFSF)] — Contention Utah R (fol. Tr. at 1456) at 1-3 and attached resume [hereinafter Dungan/Lewis Testimony].

3.5 Mr. Lewis' experience consists of 19 years in the nuclear power industry, including 10 years of experience with design, licensing, construction, and

operation of ISFSIs. He received a bachelor's degree from Montana State University in civil/structural engineering in 1980. He has been involved in fire protection projects throughout his career, including being a systems engineer for DOE in the Yucca Mountain high-level waste repository project. Currently, as the PFS lead mechanical engineer, Mr. Lewis is responsible for the design basis and review of all the design activities for fire protection for the proposed Skull Valley ISFSI. *See id.* at 3-5 and attached resume.

3.6 The Staff agrees that Mr. Dungan and Mr. Lewis should be considered experts in their respective fields so that their testimony should be given due consideration in evaluating their positions as to the adequacy of the PFS emergency plan. *See Staff Findings* at 11-12. In its proposed findings, the State did not address the purported expertise of these PFS witnesses.

2. Staff Witnesses Lain and Sullivan

3.7 The Staff also introduced two witnesses in support of the adequacy of the PFS license application relative to contention Utah R. The witnesses were Mr. Paul W. Lain and Mr. Randolph L. Sullivan, both NRC employees. The Staff likewise argues that, given these witnesses' qualifications, their statements should be considered expert testimony in support of the PFS license application on the subjects of fire protection and emergency preparedness, respectively. *See Staff Findings* at 13-14.

3.8 The proffered evidence indicates that Mr. Lain is currently employed at the NRC as an emergency preparedness specialist in the Office of Nuclear Reactor Regulation. He earned bachelor's and master's degrees in fire protection engineering, respectively, from the University of Maryland in 1983 and from Worcester Polytechnic Institute in 1996. In addition to his educational qualifications, Mr. Lain has over 25 years of technical experience. From 1983 to 1991, as a fire protection engineer for the Fire Protections Branch of the Naval Sea Systems Command, Mr. Lain was the project manager for various research projects involving fire protection on United States ships and submarines and performed design reviews and fire protection inspections on these vessels. From 1991 to 1997, Mr. Lain was employed as a fire protection engineer for the DOE Nuclear Material and Facility Stabilization Division, where he reviewed safety analysis reports for projects at the DOE Rocky Flats, Idaho Engineering National Laboratory, Savannah River, and Oak Ridge facilities. In addition, Mr. Lain is a licensed professional engineer in Maryland and has served on several National Fire Protection Association (NFPA) standards committees.² Finally, employed

²As we discuss in more detail in sections III.B.3 and IV.C.3 *infra*, the NFPA is a consensus standards development organization that produces widely accepted standards on fire safety. NRC is represented on the NFPA committee that establishes standards for nuclear facilities. *See Dungan/Lewis Testimony* at 2.

by NRC since 1997, Mr. Lain is the author of the fire protection chapter for the agency's fuel cycle facility standard review plan and has conducted safety reviews for nuclear fuel fabrication facilities. *See* NRC Staff Testimony of Paul W. Lain and Randolph L. Sullivan Concerning Contention Utah R (Onsite Fire Fighting Capability) (fol. Tr. at 1543) at 1-2 and attached statement of professional qualifications [hereinafter Lain/Sullivan Testimony].

3.9 Mr. Sullivan is an NRC emergency preparedness specialist who analyzes the emergency planning implications of potential licensee activities. He has a bachelor's degree in engineering science from the Illinois Institute of Technology and has taken various agency reactor health physics training courses. He is a board-certified health physicist with over 25 years of experience in radiological protection and emergency preparedness. Mr. Sullivan has held various positions in the nuclear industry, both with the federal government and in private industry. For example, he has been a consultant for more than a dozen nuclear facilities and has held high-level emergency planning positions at such facilities, including managing a full-scope nuclear power plant emergency preparedness program. Furthermore, in his current position as an NRC emergency preparedness specialist, he has developed and implemented inspection procedures for nuclear power plants, byproduct material licensees, a waste disposal site, and a fuel fabrication facility. *See id.* and attached statement of professional qualifications.

3.10 PFS has taken the position that, based on their qualifications and experience, the Board should give credence to the testimony of these Staff witnesses that the fire protection and the emergency planning procedures for the proposed PFS ISFSI meet all applicable NRC regulations. *See* PFS Findings at 3-4. The State did not address the qualifications of the Staff's witnesses.

3. State Witness Wise

3.11 In support of its position that, relative to fire protection matters, the PFS license application does not conform to NRC emergency planning requirements, the State presented one witness, Mr. Gary Wise. Mr. Wise, who is currently Utah State Fire Marshal, was proffered as expert on "fire safety." State Findings at 2.

3.12 Mr. Wise, who has over 30 years of experience fighting fires, holds an associate of science degree in fire science from Rancho Santiago College. His firefighting career began in 1968 as an Anaheim, California Fire Department firefighter/engineer. Thereafter, he held increasingly responsible fire safety positions, becoming Chief of the Orem County, Utah Department of Public Safety Fire Division in 1990 and then State Fire Marshal of Utah in 1996. The responsibilities of the office he currently oversees include (1) licensing and certifying Utah propane, fireworks, and fire suppression industries; (2) reviewing and inspecting newly constructed state-owned buildings; (3) assisting in fire service fire cause determinations and arson investigations; and (4) providing public

education in fire and injury prevention. In addition to this professional experience, Mr. Wise has attended a number of fire safety seminars and conferences; is certified in various emergency response areas including hazardous materials operations, emergency medical team (EMT), and peace officer; and is affiliated with various fire safety organizations, including the International Association of Fire Chiefs, the National Association of State Fire Marshals, and the Utah State Fire Chief's Association (of which he is a past president). *See* [Testimony] of Gary A. Wise on Behalf of the [State] Regarding Contention Utah R (fol. Tr. at 1588) at 1 and attached resume [hereinafter Wise Testimony].

3.13 Pointing to Mr. Wise's skills, training, and experience relating to fire safety and evaluations, the State argues that Mr. Wise's testimony in evaluating the adequacy of the PFS ISFSI emergency plan regarding fire protection, including its capability to fight onsite fires, should be given "strong weight" by the Board. State Findings at 3. In its proposed findings, the Staff declares that Mr. Wise was "well qualified as an expert witness on fire fighting." Staff Findings at 15. PFS, on the other hand, asserts that, while Mr. Wise may be qualified as a firefighter generally, he has "no particular experience evaluating the adequacy of the fire protection of a nuclear facility or the adequacy of a private or industrial fire brigade." PFS Findings at 4; *see* PFS Response at 40. In its proposed findings, PFS also suggests that Mr. Wise's testimony challenged only the number of firefighters available on site, as well as their training, but not PFS fire protection or its emergency plan. *See* PFS Findings at 4.

B. Applicable Regulatory Authority, Standards, and Guidance

1. NRC's Authority in Regulating Emergency Plans for Nonradiological Releases

3.14 Challenging Staff assertions that the agency's central focus is on radiological hazards relating to ISFSI fire safety functions, *see* Tr. 1553-61; *see also* Staff Response at 4-5, the State argues that, particularly because the PFS facility is located on a Native American reservation where the State and local governments generally cannot assert their regulatory jurisdiction over matters such as building approvals and fire inspections, NRC has a responsibility to review all aspects of the PFS emergency plan and facility design to protect public health and safety, including nonradiological concerns. *See* State Findings at 9-11. Both PFS and the Staff declare, however, that NRC emergency planning regulations are intended to protect the public and onsite personnel from radiological emissions, not from fires in general, and thus urge the Board to reject this State claim as an improper attempt to expand the agency's jurisdiction. *See* PFS Response at 42-44; Staff Response at 4-5.

2. Regulatory Standards and Associated Guidance

3.15 Also in controversy is the question of what regulatory standards and associated guidance govern the assessment of the onsite fire protection elements of the PFS emergency plan. To receive a license from the NRC to construct and operate an away-from-reactor ISFSI, 10 C.F.R. § 72.24(k) requires a description of the applicant’s plan for coping with emergency situations. The regulatory requirements generally applicable to such an emergency plan for an away-from-reactor ISFSI are described in 10 C.F.R. § 72.32(a)(1)-(16). According to the State, *see* State Findings at 3-4, most pertinent to contention Utah R are subsections (5), (7), (8), (10), (11), (12), and (15) of section 72.32(a), which provide in relevant part:

(a) Each application for an ISFSI that is licensed under this part . . . must be accompanied by an Emergency Plan that includes the following information:

* * * *

(5) *Mitigation of consequences.* A brief description of the means of mitigating the consequences of each type of accident, including those provided to protect workers onsite, and a description of the program for maintaining the equipment.

* * * *

(7) *Responsibilities.* A brief description of the responsibilities of licensee personnel should an accident occur, including the identification of personnel responsible for promptly notifying offsite response organizations and the NRC

(8) *Notification and coordination.* A commitment to and a brief description of the means to promptly notify offsite response organizations and request offsite assistance

* * * *

(10) *Training.* A brief description of the training the licensee will provide workers on how to respond to an emergency

(11) *Safe condition.* A brief description of the means of restoring the facility to a safe condition after an accident.

(12) *Exercises.* (i) Provisions for conducting semiannual communications checks with offsite response organizations and biennial onsite exercises to test response to simulated emergencies. . . .

* * * *

(15) *Offsite assistance.* The applicant’s emergency plans shall include a brief description of the arrangements made for requesting and effectively using offsite assistance on site and provisions that exist for using other organizations capable of augmenting the planned on-site response.

3.16 With respect to the requirements for satisfying 10 C.F.R. § 72.32(a), the State argues that the controlling standard for determining the adequacy of the PFS plan is the detailed implementation guidance provided in section 10.4.5 of NUREG-1567, Standard Review Plan for Spent Fuel Dry Storage Facilities at 10-14 (Mar. 2000) [hereinafter NUREG-1567]. The State notes that, as adopted in March 2000, section 10.4.5 refers to Regulatory Guide 3.67, Standard Format and

Content for Emergency Plans for Fuel Cycle and Materials Facilities (Jan. 1992) [hereinafter RG 3.67], which by its terms provides guidance on information that should be included in a 10 C.F.R. Part 30, 40, or 70 fuel cycle or materials facility emergency plan to make it acceptable to the Staff. The Staff, on the other hand, declares that section 10.4.5 of NUREG-1567 was recently revised by Spent Fuel Project Office, Interim Staff Guidance-16, Emergency Planning (June 2000) [hereinafter ISG-16], which deleted the reference to RG 3.67 and substituted guidance that incorporates much of the planning and review guidance that was included in Appendix C to the draft version of NUREG-1567, Standard Review Plan for Spent Fuel Dry Storage Facilities (Oct. 1996) [hereinafter Draft NUREG-1567], that has been utilized for Staff ISFSI reviews, including the PFS facility. The Staff argues that even though ISG-16 is only interim guidance, the Board should take judicial notice of it under 10 C.F.R. § 2.743(i) as the applicable regulatory criteria because it is the most recent version of the criteria that the Staff maintains would satisfy the requirements for a license. *See* Staff Findings at 7 n.14, 9-10; *see also* Staff Response at 2; Turk Letter at 1-2 (forwarding copy of ISG-16). Noting, as does PFS, *see* PFS Response at 40-41, that as a Staff guidance document ISG-16 only represents the Staff's view on one means of complying with regulatory requirements, the State also observes that while RG 3.67 and ISG-16 have some similar provisions, ISG-16 lacks a provision like that in paragraph 5.3 of RG 3.67 that states an emergency plan must address the consequences to a worker onsite as well as the public offsite. *See* State Findings at 4-6.

3. National Fire Prevention Association Standards

3.17 In addition to the issue of the appropriate NRC regulatory regime, also in question is which of two National Fire Prevention Association standards — NFPA 600 or NFPA 1500 — should be used to assess the PFS application. NFPA is an organization that has developed codes, standards, recommended practices, and guides to provide a minimal level of occupational health and safety for industrial firefighters, consistent with Occupational Safety and Health Administration regulations. These standards are developed through a consensus process that brings together volunteers representing varied viewpoints and interests, including NRC representatives, to achieve consensus on fire and other safety standards. *See* Staff Exh. B at unnumbered page 2 (NFPA 600, Standard on Industrial Fire Brigades (2000 ed.)) [hereinafter NFPA 600³]; Dungan/Lewis Testimony at 2.

3.18 The State asserts that to comply with 10 C.F.R. § 72.32(a) (5), (7), (10), and (11), NFPA 1500 — the NFPA standard applicable to public, governmental,

³ Unless expressly noted, all references to NFPA 600 are to the 2000 edition introduced as Staff Exhibit B.

military, private, and industrial fire department organizations — is the standard with which PFS must comply. *See* State Findings at 14; *see also* State Exh. 8 (NFPA 1500, Standard on Fire Department Occupational Safety and Health Program ¶ 1-1.2, at 1500-4 (1997 ed.)) [hereinafter NFPA 1500]. Based on the testimony of its witness Mr. Wise, the State maintains that NFPA 1500 should be the applicable standard for the PFS fire brigade given the fact that (1) the PFS site is located approximately 50 miles from Tooele City and the Tooele County Fire Department is a volunteer organization; (2) the PFS fire brigade will need to be organized, trained, and equipped to fight interior structural fires; and (3) NFPA 1500 defines a “fire department” as “an organization providing rescue, fire suppression, and related activities,” NFPA 1500 ¶ 1-5, at 1500-5, and the PFS fire brigade will be required to provide rescue services in the event of an emergency. *See* State Findings at 13-15; *see also* State Response at 2-4.

3.19 In contrast, noting that NFPA 600 applies “to any organized, private, industrial group of employees having fire fighting response duties, such as emergency brigades, emergency response teams, fire teams, and plant emergency organizations,” NFPA 600 ¶ 1-1.2, at 600-4, PFS and the Staff assert that this standard, not NFPA 1500, provides the appropriate measure against which to judge the suitability of the PFS application as it relates to various matters such as organization, training, and equipment. *See* PFS Findings at 14-15; Staff Findings at 51. According to these parties, in addition to the fact that NFPA 600 covers both fighting interior structural fires and providing emergency response service, because the PFS fire brigade will be dealing only with fires occurring at the facility — a known area with known hazards — and is not expected to respond to hazards outside the facility, it fulfills a central criterion that defines the applicability of NFPA 600. *See* PFS Findings 15-16 (citing NFPA 600 ¶¶ 1-1.2, 1-1.3, at 600-4); Staff Findings at 52-53 (same); PFS Response at 45-46.

C. Need for Offsite Firefighting Assistance for the PFS Facility

1. Offsite Assistance During Working Hours

3.20 According to the State, 10 C.F.R. § 72.32(a)(8), (12), (15), along with the respective regulatory guidance provisions of RG 3.67 and ISG-16, assume that offsite assistance will be available to an applicant to fight fires on site. And with regard to the two potential sources of offsite help identified by PFS, the first, the Tooele County Fire Department, is not reliable because it is located approximately 55 miles from the PFS site, meaning it could take up to 90 minutes for assistance to arrive. *See* State Findings at 8, 12. Similarly, the State asserts that the availability of resources from the second source — the somewhat closer town of Terra, Utah — is totally speculative and without support because, as its witness Mr. Wise recognized, the town’s population is very small and it has an

all-volunteer fire department whose members do not work there. *See id.* at 8-9. Without such a reasonably reliable offsite source for firefighting aid, the State concludes, the PFS emergency plan violates these section 72.32 provisions as well as the requirement in section 72.32(a)(5) that an emergency plan describe the means of mitigating accident consequences, which PFS cannot do given that PFS's own firefighting resources are inadequate to fight fires during working hours at the ISFSI (which PFS currently defines as from approximately 8 a.m. to 5 p.m., *see* Tr. at 1509). *See* State Response at 4-5. PFS and the Staff, however, assert that since the PFS fire brigade will be self-sufficient, there is no need to compensate with an arrangement for outside assistance from Tooele County, which the Staff maintains does not violate the provisions of NUREG-1567 notwithstanding the fact those provisions indicate that an ISFSI emergency plan should indicate the arrangements for outside assistance. *See* PFS Response at 41-42; Staff Findings at 45-46; Staff Response at 3-4.

2. Offsite Assistance During Nonbusiness Hours

3.21 The State also argues that, because the only personnel who will be present during nonbusiness hours are security guards who will not be trained as fire brigade members, the PFS emergency plan violates both section 4.2 of RG 3.67 and section 3.8.2 of ISG-16, which indicate that the Applicant be able to identify the emergency response organization during all periods, including off-hours. The State maintains that this deficiency is particularly egregious because PFS anticipates it will be approximately 90 minutes before the fire brigade members will be able to respond to the site and contain the emergency and, for the reasons already discussed in paragraph 3.20 above, effective assistance from Tooele County will not be possible to fill the void when the PFS fire brigade is not present. *See* State Findings at 8-9. PFS, on the other hand, takes the position that the only credible scenarios requiring a prompt response from the fire brigade could take place during normal working hours because there will be no operations occurring during off-hours that would present the risk of a fire that could cause a radiological release, i.e., heavy-haul trucks, SNF cask transporters, and locomotives will not operate off-hours so there is no risk of a spilled diesel fuel fire, and electricity will be turned off or not in use so that electrical fires, already unlikely to occur, will pose even less of a hazard and will be unable to spread because of the absence of other combustible material that could endanger a SNF canister or the canister transfer building (CTB). *See* PFS Findings at 16-17. The Staff agrees, asserting that section 3.8.2 of ISG-16 regarding the availability of an onsite emergency response team during off-hours is not applicable for a facility that has no need for such a response. *See* Staff Response at 2-3.

D. Noncompliance with NFPA 600

3.22 Assuming *arguendo* that the Board finds that the applicable regulatory standard for the PFS emergency plan is NFPA 600 rather than NFPA 1500, the State also alleges that the PFS plan to comply with NFPA 600 standards is deficient because (1) the record does not support a showing that there are an adequate number of personnel to staff the fire brigade; (2) PFS has failed to comply with the requirements for protective equipment or clothing; and (3) PFS has failed to provide the requisite specificity in its organizational statement or training description, instead putting forth only “sketchy” details about the type, amount, and frequency of training, the limits of the fire brigade’s actions and responsibility, and the fire brigade’s workplace duties. *See State Findings at 15-20.*

3.23 With regard to element one, noting that PFS has indicated it plans to have five employees at a time scheduled as members of the fire brigade, the State alleges the PFS facility will not be in compliance with the applicable NFPA 600 standard. This number — which the State asserts must include a senior fire brigade member to supervise the other members as well as two members for a hose from each of the two fire trucks that are available — is short of the number needed in light of the NFPA 600, 2000 edition, provision that calls for a minimum of two backup members, an allocation the present PFS staffing plan will not allow. *See State Findings at 17-19.*

3.24 In addition to the brigade member backup situation, the State also alleges that the overall fire brigade staffing is inadequate, making PFS firefighting capabilities inadequate for compliance with NFPA 600. Noting that PFS has stated it plans to train eleven personnel as fire brigade members, thereby ensuring that any absences or vacations will not interfere with there being five members present at the facility during normal hours, the State alleges that an eleven-member fire personnel contingent would be inadequate because PFS is trying to do too many things with too few people. *See State Findings at 16-17.*

3.25 Referencing the evidentiary record, the State notes that there are a total of twenty-four nonsecurity personnel that PFS indicates it could train as fire brigade members. The eleven persons PFS has indicated it will train to be brigade members under NFPA standards will include the entire staff of its Instrument/Electrical Maintenance, Mechanical Maintenance/Operations, and Radiation Protection departments. The remaining nonsecurity staff that PFS has indicated are not to be trained as members of the brigade are all persons in its Quality Assurance (three people), Nuclear Engineering (five people), and Administration (five people) departments. Given the PFS testimony that it will have two persons manning the fire hose and one person on backup, the State calculates PFS will not have enough trained fire brigade personnel to do all it claims it can do to fight fires because it will need one firefighter to drive the onsite

PFS fire truck and another to drive the fire truck located at the Skull Valley Band reservation village, if necessary. Since there would need to be one firefighter to hook up and operate the hose on each truck, in addition to the two people manning the hose, and an incident commander and backup firefighters, the State argues the PFS numbers are wholly inadequate to satisfy its proposed protocol. *See id.*

3.26 PFS, however, asserts it will have enough responders to comply with the latest version of NFPA 600 requiring two backup members and that its eleven trained personnel will be adequate to provide the necessary coverage. According to PFS, it will need only two members to operate a single hose that would be needed, leaving two backup members (one of which will be the senior fire brigade member) and, although it should not need the Skull Valley Band fire truck, if needed one brigade member could retrieve, attach a hose to, and operate the fire truck (i.e., monitor hose pressure) while two other members use the hose on the fire. *See* PFS Response at 46 & n.39, 48-49 & n.40; *see also* Tr. at 1666.

3.27 An additional State claim is that PFS is not in compliance with subchapter 5-3 of NFPA 600, which describes necessary fire brigade protective clothing and equipment, because of the proposed location housing the self-contained breathing apparatus (SCBA) and other personal protective equipment. By placing that equipment inside the Security and Health Physics Building (SHPB), the State argues, the firefighters will be put in danger in that (1) having to retrieve the equipment would cause a delay in their response to a fire in the CTB; and (2) the firemen undoubtedly would be tempted to start an attack on the fire without first retrieving their gear, thus putting their lives in jeopardy if the fire proceeded to burn beyond an incipient stage. *See* State Findings at 15-16. PFS responds that (1) since PFS has taken no credit for fire brigade actions in calculating the bounding results of the worst credible fire at the PFS facility, response delay caused by equipment location has no safety significance; and (2) the State has shown nothing to support its assertion that firefighters would act before getting the appropriate equipment in contravention of paragraph 2-2.1.6 of NFPA 600. *See* PFS Response at 46-47.

3.28 Finally, in connection with the State's concern that, in contravention of NFPA 600 paragraphs 1-4.1 and 2-1.2.1 and 10 C.F.R. § 72.32(a), PFS has not provided the necessary details regarding training, limits to the fire brigade's actions, and the fire brigade members' workplace duties in addition to being in the brigade, *see* State Findings at 16, PFS and the Staff take the position that NRC case law does not require implementing procedures such as these items be included in an emergency plan, *see* PFS Response at 47-48; Staff Findings at 49-50.

E. Water Supply

3.29 In the State's reply findings it alleges that both PFS and the Staff in their findings assume there will be no impediments to obtaining a water supply to fill the two 100,000-gallon water tanks that will feed the proposed foam/water sprinkler system in the CTB. The State, however, claims there is no firm source for the water supply and this deficiency is so detrimental to the emergency plan as to put it in nonconformance with applicable NRC regulations. *See* State Response at 6. In its initial findings, the Staff indicated it had no reason to believe PFS could not fulfill its water needs by drilling the necessary onsite wells, or by purchasing the water from an offsite source. *See* Staff Findings at 33-35.

F. License Conditions

3.30 In its reply findings, the State argues that the recent Commission decision in CLI-00-13 dictates that all of the commitments PFS has made relative to emergency planning in its proposed findings to comply with various NFPA standards are required to be added as conditions to any license that is issued. *See* State Response at 5-6. PFS asserts that the NFPA standards are already enforceable commitments in that they are part of the PFS license application and associated submissions and that, in any event, they do not constitute a major safety area that requires a license condition. *See* PFS CLI-00-13 Response at 8-9. The Staff also asserts that these matters do not constitute significant safety concerns that warrant a license condition and, furthermore, that the State's reading of CLI-00-13 is overbroad in that the decision relates only to the financial assurance items involved with contention Utah E/Confederated Tribes F. *See* Staff CLI-00-13 Response at 4-7.

3.31 Regarding these matters at issue relative to contention Utah R, below the Board sets forth its factual findings and legal conclusions.

IV. FACTUAL FINDINGS AND LEGAL CONCLUSIONS

A. Findings Regarding the PFS Application and Proposed ISFSI Facility

1. The PFS Facility

4.1 In June 1997, PFS filed an application with the agency pursuant to 10 C.F.R. Part 72 for a 20-year license that would allow it to create and maintain an ISFSI for an initial 20-year period with the possibility of renewal for an additional 20 years. PFS plans to construct, operate, and decommission the facility through equity contributions of its owners and by service agreements that commit customers to preshipment payments and annual SNF storage fees.

The PFS ISFSI is designed to accommodate up to 4000 concrete storage casks containing sealed metal canisters holding as much as 40,000 metric tons of uranium in the form of SNF from commercial nuclear reactors. The PFS license application includes, among other things, a safety analysis report (SAR) and an emergency plan. *See* Staff Exh. A, encl. at 1-1, 17-3 to -5 (Dec. 15, 2000 [NRC Staff] Safety Evaluation Report of the Site-Related Aspects of the [PFS ISFSI] (as revised Jan. 4, 2000)) [hereinafter Staff SER].

4.2 The planned PFS ISFSI is to occupy 820 acres within the confines of the 18,000 acre reservation of the Skull Valley Band in Tooele County, Utah. Although there are no large towns within 10 miles of the proposed PFS facility, the thirty-resident reservation village is located about 3.5 miles east-southeast of the PFS site. *See id.* at 1-1. Beyond the reservation, the nearest residential area relative to the proposed PFS ISFSI is Terra, Utah, which is located approximately a dozen miles away. *See* Tr. at 1471. Further, the reservation is located approximately 27 miles west-southwest of the Tooele County seat of Tooele City; however, the actual driving distance from the proposed PFS facility to Tooele City is about 55 miles. *See* Staff SER at 1-1; Wise Testimony at 9; PFS Exh. G at 1-4 (PFS Emergency Plan, Chapter 1 (rev. 9)).

4.3 Tooele County and PFS have developed an assistance arrangement under which county fire personnel can be requested in the event of an emergency at the ISFSI. *See* Tr. at 1547; Staff SER at 16-5; *see also* PFS Exh. G, at 9.5-2 (PFS SAR, Chapter 9 (rev. 13)). The members of the county fire department in cities in Tooele County, including Tooele City, are all volunteer firefighters and thus hold a variety of other full-time positions such as law enforcement officers. *See* Wise Testimony at 3. In addition, the PFS emergency plan describes other PFS assistance arrangements for first aid, medical, and hospital services. For example, the Tooele Valley Medical Center is equipped to provide decontamination and ambulance services and an ambulance procured by PFS will be stationed at the facility to carry any injured personnel to the medical center. *See* Staff SER at 16-2; PFS Exh. G at 1-4.

4.4 A principal feature of the 860 acre PFS facility is the 99 acre Restricted Area. And relative to fire protection matters, cardinal locations within the Restricted Area are (1) the Canister Transfer Building, where the SNF steel canister will be transferred from a shipping/transportation cask to a storage cask; (2) the storage pad area, where loaded storage casks will be placed on concrete pads in a 2 × 4 array; and (3) the Security and Health Physics Building, which is the control point for the Restricted Area. Within the CTB, there is a cask load/unload bay area, into which a transportation cask containing the SNF canister will be delivered by rail or heavy-haul truck; a crane bay/transfer cell area, in which the SNF canister is transferred from a transportation cask to a storage cask; and a transporter bay, in which a cask transporter vehicle operates to remove the loaded storage cask from the CTB. The SHPB, which contains the central

monitoring alarm station for the Restricted Area, fire brigade equipment, and an emergency diesel generator, is the location from which the PFS fire brigade will be dispatched. *See* Dungan/Lewis Testimony at 5; Lain/Sullivan Testimony at 5-7; *see also* PFS Exhs. A (PFS SAR, Figure 1.2-1, PFS Facility General Arrangement (rev. 3)), B (PFS SAR, Figure 4.7-1, Canister Transfer Building (Sheet 1 of 3) (rev. 11)), C (PFS SAR, Figure 4.3-1, Canister Transfer Building Fire Zones & Barriers (rev. 11)).

4.5 The Restricted Area is surrounded by an inner chain-link security fence and an outer chain-link nuisance fence, with an isolation zone and intrusion detection system located between the two fences. *See* Lain/Sullivan Testimony at 6; Staff SER at 1-1. The Restricted Area will be covered with compacted gravel that will surround the storage cask pads to a depth of 1 foot and will be devoid of any significant combustibles. *See* Dungan/Lewis Testimony at 5. In addition, a minimum distance of 200 feet will be maintained between the storage pad area and any vegetation. *See* Lain/Sullivan Testimony at 6.

4.6 Outside of the Restricted Area will be the Administration Building (AB) and the Operations and Maintenance Building (OMB). These buildings house administrative and maintenance offices and equipment that are not directly associated with SNF handling and storage. *See* Dungan/Lewis Testimony at 7, 22.

4.7 PFS has proposed two methods for transporting SNF canisters to its facility. The first proposal is to utilize rail transit, which would deliver transportation casks directly to the outside of the CTB. To implement this transfer mode, PFS must construct a new rail line to the CTB beginning from Low Junction, a junction with the main rail line some distance to the northwest of the Skull Valley Band reservation. The other transportation mode being considered is a combination of rail and heavy-haul tractor-trailer by which the transportation casks would be off-loaded from the main rail line onto a truck at the proposed Rowley Junction ITP and transported by the truck the remaining distance to the CTB. Under either method, SNF canisters will be transferred from the transportation casks to the storage casks in the CTB and then placed on storage pads in the Restricted Area. *See* Staff SER at 1-1. 4.8

2. PFS Fire Brigade

4.8 Included as a feature of the PFS emergency plan is a fire brigade that will have the responsibility to fight emergency fires on site. The fire brigade will consist of a minimum of five people who are to be trained and equipped in accordance with NFPA 600, the standard for industrial fire brigades. At least eleven individuals — the personnel in the PFS Instrument/Electrical Maintenance, Mechanical Maintenance/Operations, and Radiation Protection departments — will receive training for the brigade. *See* PFS Exh. G at 4-3 (PFS Emergency Plan,

Chapter 4 (rev. 9)); *see also* State Exh. 1, at unnumbered p. 4 (PFS Emergency Plan, Figure 4-1, Functional PFSF Organization (rev. 8)); State Exh. 2, at 1 of 2 (Private Fuel Storage Facility (PFSF) Safety Requests for Additional Information (RAI) No. 2, EP-7 Response).

4.9 Of the five fire brigade members who are required to be on call at all times, one will be a senior member with significant knowledge about the electrical and mechanical equipment at the site. The senior member will supervise the four remaining persons, with two on each fire hose. *See* State Exh. 2, at 1 of 2. PFS will have access to two fire trucks for emergency purposes: one located at the PFS ISFSI site and one located at the Skull Valley Band village, approximately 5 miles from the PFS facility. *See* PFS Exh. G at 1-4; State Exh. 3, at 1 of 1 (PFS Safety RAI No. 2, EP-8 Response).

4.10 The PFS emergency plan does not require that the fire brigade members be at the site during off-hours. In the event of a fire emergency during off-hours, the PFS fire brigade will be summoned. The senior member on call will have a pager and the other members will be available by phone. *See* PFS Exh. G, at 4-3; State Exh. 2, at 1 of 2.

B. Findings and Conclusions Regarding the Parties' Witnesses

4.11 In section III.A above, we have presented a detailed description of each party's witnesses, which we incorporate as part of our findings herein. We turn now to the question of the weight to be given to each witness's testimony relative to the matters at issue regarding contention Utah R.

4.12 When the qualifications of a witness are challenged, the party sponsoring the witness has the burden of demonstrating his or her expertise. *See Pacific Gas and Electric Co.* (Diablo Canyon Nuclear Power Plant, Units 1 and 2), ALAB-410, 5 NRC 1398, 1405 (1977). The qualifications of an expert can be established by showing relevant knowledge, skill, experience, training, or education. *See Duke Power Co.* (William B. McGuire Nuclear Station, Units 1 and 2), ALAB-669, 15 NRC 453, 474-75 (1982) (citing Fed. R. Evid. 702).

4.13 The State presented the testimony of Utah State Fire Marshal Gary Wise to support its claim that the PFS emergency plan was inadequate on several counts with respect to fire safety. PFS challenges Mr. Wise as having "no particular experience evaluating the adequacy of the fire protection of a nuclear facility or the adequacy of a private or industrial fire brigade." PFS Findings at 4. The Board, however, is impressed with the diverse background of Mr. Wise and his experience in the area of firefighting generally. Nonetheless, relative to the State's request that we "strongly consider" Mr. Wise's testimony, the State has not established the grounds for giving his opinions special weight. Mr. Wise is an experienced firefighter who has been performing fire safety duties for over 30 years. *See supra* ¶ 3.12; *see also* Wise Testimony at 1-3 and attached resume. His

general experience, however, does not include membership on, or the evaluation of, a private or industrial fire brigade or (aside from his activities relative to the PFS application) the review or analysis of the fire protection plans for, or the fire hazards present at, a nuclear facility. He admitted his lack of familiarity with NRC guidelines with respect to fire protection or fire brigades at a nuclear facility. *See* Tr. at 1624-26, 1628-29.

4.14 In contrast to Mr. Wise, the witnesses presented by PFS and the Staff possess significant credentials relative to designing or evaluating the adequacy of a nuclear facility fire safety plan and fire brigade. PFS witnesses Dungan and Lewis both have academic and technical training that makes them suited to design nuclear facility fire safety plans. As previously noted, Mr. Dungan has a bachelor's degree in fire protection engineering, a master's degree in environmental engineering, and has some 30 years experience practicing fire protection engineering. *See supra* ¶ 3.4; *see also* Dungan/Lewis Testimony at 1-3 and attached resume. Mr. Lewis has a bachelor's degree in civil/structural engineering and 19 years of experience in the nuclear industry, including 10 years working with ISFSIs. *See supra* ¶ 3.5; *see also* Dungan/Lewis Testimony at 3-5 and attached resume.

4.15 Staff witnesses Lain and Sullivan also possess relevant credentials and fire safety technical experience, as well as familiarity with NRC regulatory requirements as longtime agency employees. Mr. Lain has a bachelor's degree and a master's degree in the area of fire protection engineering and has worked in the area of fire protection engineering for 16 years, including nearly 10 years of government fire protection experience relevant to analyzing and evaluating the adequacy of fire protection plans. *See supra* ¶ 3.8; *see also* Lain/Sullivan Testimony at 1 and attached resume. Mr. Sullivan likewise is qualified to make a determination about the regulatory adequacy of the PFS emergency plan, including its fire protection provisions. A health physicist for over 25 years with experience in emergency preparedness and radiological protection, he has a bachelor's degree in engineering science, worked at the NRC in the 1970s as an inspector of emergency preparedness plans at power reactors, and is currently employed at NRC as an emergency preparedness specialist. *See supra* ¶ 3.9; *see also* Lain/Sullivan Testimony at 1 and attached resume.

4.16 We thus find that, while the State has established Mr. Wise's general expertise in the area of fire safety, it has not given the Board any reason to attach particular significance or deference to his testimony in the context of this proceeding. The Board nonetheless will give Mr. Wise's testimony appropriate weight commensurate with its merits. We likewise find that PFS and the Staff have established the expertise of their witnesses relative to fire safety matters.

C. Findings and Conclusions Regarding Applicable Regulatory Authority, Standards, and Guidance

1. NRC's Authority and Responsibility for Nonradiological Releases

4.17 As was noted in section III.B above, the State also has asserted that the NRC has authority “to review the totality of PFS’s Emergency Plan as it relates to PFS’s onsite fire fighting capability, including its ability to protect the health and safety of the public and on-site workers, including PFS fire fighters.” State Findings at 11. The State believes that this inquiry also includes the “adequacy of PFS’s staffing, training, and equipment to effectively fight any and all fires onsite, whether or not they result in a radiological release.” *Id.* Further, according to the State, “[i]n this case, there is a void in the typical building approvals and fire inspections that local governments usually undertake because PFS is located on an Indian reservation that performs absolutely no governmental functions.” *Id.* at 10. Therefore, the State alleges, it is the NRC’s duty to step in and “fill the interstices in the regulations.” *Id.*

4.18 As the Commission has made clear, the scope of NRC regulatory authority does not extend to all questions of fire safety at licensed facilities; instead, the scope of agency regulatory authority with respect to fire protection is limited to the hazards associated with nuclear materials. Thus, while the agency’s radiological protection responsibility requires it to consider questions of fire safety, this does not convert the agency into the direct enforcer of local codes, Occupational Safety and Health Administration regulations, or national standards on fire, occupational, and building safety that it has not incorporated into its regulatory scheme. *See Curators of the University of Missouri*, CLI-95-8, 41 NRC 386, 393 (1995); *see also Curators of the University of Missouri*, CLI-95-1, 41 NRC 71, 159 (1995).

4.19 Given this Commission delineation of the agency’s fire protection authority, we are unable to accept the State’s argument that the agency must take regulatory jurisdiction over the nonradiological aspects of fire protection regulation at the PFS facility because the facility is located on the reservation of the Skull Valley Band. Moreover, we would point out that whether or not the Skull Valley Band reservation is subject to fire protection regulation by the State or local government bodies, it seemingly is subject to regulation under other generally applicable federal statutes, such as the Occupational Safety and Health Act (OSHA). *See Reich v. Mashantucket Sand & Gravel*, 93 F.3d 174, 177-82 (2d Cir. 1996) (OSHA applicable to tribal-owned construction business); *see also FPC v. Tuscarora Indian Nation*, 362 U.S. 99, 116 (1960). Under these

circumstances, we decline the State's invitation to delve into all nonradiological fire protections hazards relating to the PFS emergency plan.⁴

2. *RG 3.67 and ISG-16*

4.20 The parties apparently are in disagreement about the standard to be used to determine whether the PFS plans are acceptable in addressing the possible fire dangers at the ISFSI. *See* section III.B.2 above. The State has argued that the appropriate NRC guideline is RG 3.67 as referenced in the March 2000 final version of the ISFSI standard review plan, NUREG-1567, asserting, in particular, that section 5.3 of RG 3.67, unlike section 3.6.1 of ISG-16, requires that the PFS EP "address the mitigation of consequences to workers onsite as well as to the public offsite." *See* State Findings at 6. In contrast, PFS and the Staff have argued that the appropriate standard for review is ISG-16. For the following reasons, we find that we need not resolve this "dispute" to the degree that it appears to have no material impact on our determination here.

4.21 In pertinent part, section 5.3 of RG 3.67 indicates that "[f]or the events identified in Chapter 2 [regarding the types of accidents that must be considered for emergency planning purposes], briefly describe the means and equipment provided for mitigating the consequences of each type of accident. Include the mitigation of consequences to workers onsite as well as to the public offsite." RG 3.67, at 3.67-7. Although the State maintains there is no parallel provision in ISG-16, in fact, in language identical to that used in the October 1996 draft of NUREG-1567, which was the Staff guidance document in effect when the PFS application was filed and reviewed initially, section 3.6.1 of ISG-16 declares that "[t]he plan should include actions to be taken to limit and mitigate the consequences to [the] public and workers." *Compare* Draft NUREG-1567, at 6-9 *with* ISG-16, at 7. We see no material difference between the provision of RG 3.67 and this draft NUREG-1567/ISG-16 standard, to which the State did not object previously. Accordingly, we fail to see there has been any material change in the Staff's guidance relative to the State's specific objection.

⁴We note that while there is language in section 3.1 of RG 3.67 and section 3.3 of ISG-16 indicating that an evaluation of the "hazardous materials" at a site that may affect the efficacy of an emergency response should be included in an emergency plan, those provisions do not mandate a different result here. Putting aside the fact that these two Staff items are guidelines, not requirements, relating to the sufficiency of an applicant's emergency plan, we observe that section 3.1 of RG 3.67 acknowledges that an applicant "may wish to include in the emergency plan some incidents that do not fall within the jurisdiction of the NRC," and offers further guidance that this provision is intended to allow applicants "to have a single emergency plan that can apply to all [applicant] needs and regulatory requirements." RG 3.67, at 3.67-5. In other words, the goal of creating such language in the guidance was efficiency and regulatory convenience for the applicant rather than to thrust the Board into the area of nonradiological fire protection hazards analysis that the Commission clearly has indicated it should eschew.

Finally, to the degree hazardous materials are within the Board's area of concern, PFS has stated that it has complied with 10 C.F.R. § 72.32(a)(13), which requires that an applicant certify it has satisfied the obligations imposed by the Emergency Planning and Community Right-to-Know Act of 1986, 42 U.S.C. § 11001, with respect to hazardous materials at the facility. *See* Tr. at 1553-54.

3. NFPA Guidelines

4.22 As described above, *see* section III.B.3, *supra*, there also is a controversy among the parties regarding the applicable NFPA standard to be used for measuring PFS emergency planning adequacy. The State has argued that PFS incorrectly has relied upon the NFPA 600 standard rather than the NFPA 1500 requirements, which the State believes should be satisfied because they set minimum standards for an occupational safety and health program that would provide workers and the public a higher degree of protection than NFPA 600. *See* State Findings at 6-7. PFS and the Staff assert that NFPA 600 is the appropriate guidance for evaluation of the emergency plan.

4.23 NFPA is a respected standard-setting organization whose guidelines reflect a consensus of varying views, including those of the NRC, on the best ways to maximize the effectiveness of fire protection efforts. *See* Dungan/Lewis Testimony at 2; NFPA 600 at unnumbered p. 2. Nonetheless, because only statutes, regulations, orders, and license conditions can impose requirements on applicants and licensees, *see Curators of the University of Missouri*, CLI-95-1, 41 NRC at 98, 150, NFPA standards generally would be considered by the Board only as another type of guidance material in assessing the adequacy of the PFS emergency plan relative to the State's concerns.

4.24 With this in mind, we turn to the question of which of the party-posed NFPA standards — NFPA 600 or NFPA 1500 — we should look to in this instance. In support of its position, the State relies upon the language of the provisions in NFPA 1500 and on the testimony of Mr. Wise regarding that provision, both of which we consider in turn.

4.25 NFPA 1500 defines an “Industrial Fire Department” as follows:

An organization providing rescue, fire suppression, and related activities. It can also provide emergency medical services, hazardous material operations, or other activities. These activities can occur at a single facility or facilities under the same management, whether for profit, not for profit, or government owned or operated, including occupancies such as industrial, commercial, mercantile, warehouse, and institutional. The industrial fire department is generally trained and equipped for specialized operation based on site-specific hazards present at the facilities.

NFPA 1500 ¶¶ 1-5, at 1500-6. In addition, NFPA 1500 adds that:

This standard does not apply to industrial fire brigades or industrial fire departments meeting the requirements of NFPA 600 Industrial fire brigades or fire departments shall also be permitted to be known as emergency brigades, emergency response teams, fire teams, plant emergency organizations or mine emergency response teams.

Id. ¶¶ 1-1.3, at 1500-4. In contrast, NFPA 600 defines an industrial fire brigade as:

An organized group of employees within an industrial occupancy who are knowledgeable, trained, and skilled in at least basic fire fighting operations, and whose full-time occupation might or might not be the provision of fire suppression and related activities for their employer.

See NFPA 600 at 600-5 (¶ 1-5.23). And in pertinent part, NFPA 600 also states:

[¶ 1-1.1] This standard contains minimum requirements for organizing, operating, training, and equipping industrial fire brigades. It also contains minimum requirements for the occupational safety and health of industrial fire brigade members while performing fire fighting and related activities.

[¶ 1-1.2] This standard shall apply to any organized, private, industrial group of employees having fire fighting response duties, such as emergency brigades, emergency response teams, fire teams, and plant emergency organizations.

[¶ 1-1.3] This standard shall not apply to industrial fire brigades that respond to fire emergencies outside the boundaries of the industrial site when the off-site fire involves unfamiliar hazards or enclosed structures with layout and contents that are unknown to the industrial fire brigade.

See NFPA 600, at 600-4.

4.26 Referencing paragraph A-1-5 of the Appendix A explanatory material for NFPA 1500 that describes industrial fire departments, the State argues that PFS has “overlook[ed] the clear statement in NFPA 1500 that most industrial fire brigade[s] are not fire departments, but where a facility is located far from a municipality that has an organized fire department and the fire brigade will perform rescue operations, it is a fire department.” State Findings at 14 (citing NFPA 1500 ¶ A-1-5 and Wise Testimony at 9). That particular provision states:

The vast majority of industrial fire brigades are not industrial fire departments. Industrial fire departments are those few brigades that resemble and function as municipal fire departments. These are generally found only at large industrial facilities and at industrial facilities that also perform municipal firefighting, usually where the plant is located far from municipalities with organized fire departments.

NFPA 1500, at 1500-24. Furthermore, in its reply findings the State argues that paragraph A-1-1 of the Appendix A explanatory material for NFPA 600 does not distinguish between industrial fire departments and industrial fire brigades, thus undercutting the position of PFS and the Staff that NFPA 1500 applies only to industrial fire departments. *See* State Response at 3-4. In pertinent part, paragraph A-1-1 of NFPA 600 Appendix A states:

While every industrial fire brigade is unique, just as every municipal fire department is unique, industrial fire brigades, including those that can be referred to as industrial fire departments, have far different needs in many respects from those of municipal fire departments.

NFPA 600, at 600-12.

4.27 We conclude that NFPA 600, not NFPA 1500, provides an appropriate framework within which to review PFS compliance with emergency planning requirements relating to fire protection, albeit with the caveat, as noted in paragraph 4.23 *supra*, that we take NFPA standards generally to be guidelines, not requirements. Moreover, relative to the language contained in Appendix A of NFPA 1500 and NFPA 600 upon which the State has relied, we note that Appendix A for both standards, which is entitled “Explanatory Material,” includes a preamble immediately proceeding its provisions that declares “*Appendix A is not a part of the requirements of this NFPA document but is included for informational purposes only.*” NFPA 600, at 600-12 (emphasis in original); NFPA 1500, at 1500-23 (same).

4.28 Bearing in mind the status of the NFPA standards and explanatory material, we find the circumstances in this instance regarding the training and scope of the duties of the members of the PFS fire brigade to be compelling relative to its status as a NFPA 600 industrial fire brigade, as opposed to a NFPA 1500 industrial fire department. Besides being on the fire brigade, the PFS employees who are brigade members will have regular duties in, and a concomitant familiarity with, the PFS facility and its activities. This familiarity with, and focus on, the PFS facility will be further enhanced by the fact that PFS fire brigade members will be expected to fight fires that arise from activities in the facility, not offsite fires. As a consequence, they will not be placed in the position of having to cope with fires in unaccustomed areas. Additionally, PFS intends that fire brigade members achieve familiarity with the facility and any fire hazards through various training programs that will have a focus on the particular problem of fires that may lead to radiological impacts. *See* Lain/Sullivan Testimony at 19; State Exh. 4, at 1 of 2 (PFSF Safety RAI No. 2, EP-21 Response).

4.29 Familiarity with the site and the hazards involved is a persistent theme in the NFPA 600 standard regarding industrial fire brigades. Paragraph 1-1.3, quoted in paragraph 4.25 above, indicates that NFPA 600 standards would not apply to industrial fire brigades that respond to unknown emergencies outside the boundaries of the industrial site when the fire involves unknown hazards or enclosed structures with layout and contents that are unknown to the firefighters. The role that experience and understanding of facility hazards play relative to this standard’s application is further highlighted by the recognition in NFPA 600 paragraph 1-5.23, also quoted above, that brigade members need not have fire suppression as their full-time occupation. Moreover, while this same portion of NFPA 600 does indicate that an industrial fire brigade member should be trained in basic firefighting skills, there also is a recognition in paragraph A-1-1 of the Appendix A explanatory material notes that “[t]he distinct advantage of familiarity achieves a higher level of industrial fire brigade safety and allows for the fundamental difference between a municipal fire department and an industrial fire brigade.” NFPA 600, at 600-12.

4.30 As quoted above, paragraph of A-1-5 of Appendix A to NFPA 600 does suggest that 50-mile distance between the facility and Tooele City, which has the nearest municipal fire department, is a factor in determining whether PFS should look to satisfy NFPA 1500 versus NFPA 600 standards. In this instance, however, the PFS showing regarding its self-sufficiency in dealing with any problems that may arise in the Restricted Area, which is detailed in section IV.D *infra*, substantially undercuts the significance of this guidance. So too, the State's assertion that under NFPA guidance an entity labeled an industrial fire brigade can be treated as an NFPA 1500 industrial fire department is not compelling here when, as we have indicated, the circumstances that define the PFS brigade clearly fall within the confines of the NFPA 600 industrial fire brigade, whatever the PFS entity might be called. Finally, although, as Mr. Wise suggests in his testimony, the application of the NFPA 1500 standards might subject the members of the PFS fire brigade to additional training and more comprehensive requirements, *see* Tr. at 1607-08, that would be the case with the fire suppression team at this facility or any other to which the label "industrial fire brigade" might be attached. PFS is, of course, free to adopt that enhanced standard if it wishes to, but we find it inapplicable for the purposes of our decision on the adequacy of the PFS emergency plan as it relates to the State's contention Utah R issues.

D. Findings and Conclusions Regarding Offsite Firefighting Assistance

4.31 As was noted in section III.C, the State asserts that, contrary to the precepts of 10 C.F.R. § 72.32(a)(8), (12), (15), and the associated regulatory guidance of RG 3.67 and ISG-16, the PFS emergency plan does not provide adequate offsite support capabilities to fight fires that occur on site during both facility working and nonworking hours. With respect to the State's concerns about the adequacy of offsite assistance, we conclude that the PFS emergency plan is sufficient to protect onsite workers and the general public from the danger of a fire-related radiological release because fire protection measures have been undertaken at the facility such that, regardless of whether offsite assistance is available, PFS can mount a self-sufficient response that will provide the requisite adequate protection.

1. PFS Facility Fire Prevention/Mitigation Measures

4.32 With its contention Utah R, the State alleges that, in contravention of 10 C.F.R. § 72.32(a), the means and equipment for mitigation of potential accidents involving fires are not adequately described because PFS has not demonstrated adequate support capability on site or the availability of adequate offsite assistance. In addressing this claim, however, both PFS and the Staff point

to 10 C.F.R. § 72.122, which provides a general design criterion for fire protection measures at an ISFSI. See PFS Findings at 5; Staff Findings at 16 n.19. Section 72.122 provides in relevant part:

(b) *Protection against environmental conditions and natural phenomena.* (1) Structures, systems, and components important to safety must be designated to accommodate the effects of, and to be compatible with, site characteristics and environmental conditions associated with normal operation, maintenance, and testing of the ISFSI . . . and to withstand postulated accidents.

* * * *

(c) *Protection against fires and explosions.* Structures, systems, and components important to safety must be designed and located so that they can continue to perform their safety functions effectively under credible fire and explosion exposure conditions. Non-combustible and heat-resistant materials must be used wherever practical throughout the ISFSI . . . , particularly in locations vital to the control of radioactive materials and to the maintenance of safety control functions. Explosion and fire detection, alarm, and suppression systems shall be designed and provided with sufficient capacity and capability to minimize the adverse effect of fires and explosions on structures, systems, and components important to safety. The design of the ISFSI . . . must include provisions to protect against adverse effects that might result from either the operation or the failure of the fire suppression system.

* * * *

(g) *Emergency capability.* Structures, systems, and components important to safety must be designated for emergencies. The design must provide for accessibility to the equipment of onsite and available offsite emergency facilities and services such as hospitals, fire and police departments, ambulance service, and other emergency agencies.

As part of their argument in support of the adequacy of the fire protection provisions of the Skull Valley facility emergency plan, PFS and the Staff have asserted that the facility’s design, made in conformance with section 72.122(c), supports a finding of facility fire protection self-sufficiency such that offsite assistance is not necessary during working and nonworking hours. Specifically, PFS and the Staff presented witnesses — whose testimony was essentially uncontested — who described the specific facility design fire prevention or mitigation elements.

4.33 In addition to providing a description of the layout of the proposed ISFSI as it relates to fire protection considerations, findings with respect to which are set forth in section IV.A.1 above, PFS witnesses described the onsite combustible materials that required consideration in fashioning fire protection measures to prevent the release of radiological materials and the methods that PFS has proposed to respond to a fire event at the sections of the Restricted Area that are central from a fire safety standpoint. Moreover, the testimony of Staff witnesses confirmed this PFS showing, which was intended to establish that the facility and the associated emergency plan are adequate in description and construction to fulfill the agency regulatory requirements regarding prevention

of fire-related radiological emissions. *See* Dungan/Lewis Testimony at 5-25; Lain/Sullivan Testimony at 5-12.

4.34 As described by PFS witness Lewis, the combustible materials that could be present at the proposed Skull Valley ISFSI include (1) the diesel fuel in the cask transporter vehicle, a tracked vehicle (i.e., without tires) that will move empty storage casks into the CTB transfer cells and then move the storage casks from the CTB transfer cells to the concrete storage pads; (2) if the Rowley Junction ITP is used, the diesel fuel in the heavy-haul trucks that could be used to transport the casks from the ITP to the CTB; (3) the tires on the aforementioned truck; (4) fuel and tires of vehicles that may be intermittently present in the Restricted Area; (5) the fuel and tires of the diesel fuel delivery truck that would bring fuel to the cask transporter vehicle; (6) fuel and tires of maintenance, security, and emergency vehicles not entering the Restricted Area; (7) diesel fuel in the tanks of locomotive engines, if they are used to transport the casks between offsite locations and carry the casks to and from the CTB; (8) fuel for the backup generator at the SHPB; (9) diesel in the tank for the diesel-driven water pump located outside of the Restricted Area; (10) the diesel fuel supply for the cask transporter; (11) the diesel fuel supply for the heavy-haul trucks or the onsite vehicles; (12) the propane tanks for use in heating the SHPB and CTB; (13) propane for heating the OMB and AB; and (14) gasoline stored in containers for use in equipment such as tractors, lawn mowers, or snowblowers. *See* Dungan/Lewis Testimony at 6-7.

4.35 Various fire protection designs will be employed at the ISFSI to combat the possible fires that could ignite from these combustibles that could be present at the site. Employing the “defense-in-depth” principle in designing its ISFSI, PFS has sought to reduce the likelihood of fires as well as utilize detection systems and automatic and manual suppression systems for those that do occur, provide for compartmentalization and spill control to prevent the spread of fire, and implement structural fire resistance. Additionally, PFS has committed to adhering to the standards set out in NFPA 801, the national consensus standard for providing fire protection for nuclear materials facilities.⁵ *See id.* at 7.

4.36 Relative to the design features that PFS has proposed to minimize the likelihood of a fire event in the portions of the Restricted Area that are of principal concern from a fire safety standpoint, PFS and the Staff provided testimony concerning two areas of the proposed facility in which spent fuel transportation and/or storage casks will be handled — the CTB and the storage pads. *See* Dungan/Lewis Testimony at 8-9; Lain/Sullivan Testimony at 5-7.

⁵NFPA 801, which was developed with NRC participation, provides a national consensus standard for fire protection for nuclear materials facilities. *See* Dungan/Lewis Testimony at 7.

a. *Canister Transfer Building*

4.37 If rail transportation along the Low Rail Spur is used to bring the casks to the CTB, the CTB will be protected from locomotive-induced fuel spills and fires in several ways. Administrative controls and physical measures, such as placing a spacer car between the transportation cask rail car and the locomotive and the use of rail stops, will not allow locomotives within the CTB and, in fact, will leave the locomotive fuel tank some 36 feet outside the CTB. Also, to prevent diesel fuel spills from getting into the building from the outside, the ground near the entrance of the CTB will be sloped away from the building. *See Dungan/Lewis Testimony at 9, 19; Lain/Sullivan Testimony at 11-12.*

4.38 In addition to office/equipment rooms and a low-level waste storage room, all of which are separated from other areas by a 1-hour fire barrier and, in the latter instance, has metal barrel storage for any contaminated combustible materials, the CTB includes an operations area that contains three bay areas: the cask transporter bay, the crane/transfer cell bay, and the cask load/unload bay. The cask transporter bay, which is the area where the cask transporter moves storage casks in and out of the transfer cells, is separated from those cells by a 2-hour fire barrier. In contrast to the crane bay, which has a 90-foot ceiling, each of the three transfer cells within the crane bay has no ceiling to allow the gantry crane to perform SNF canister transfer operations between transportation and storage casks, although they are separated from each other and the load/unload bay by 30-foot high, 1-foot thick concrete walls. Finally, the cask load/unload bay, which is the area used to unload transportation casks from rail cars or heavy-haul trailers, has a crane bay, and two low bays. The crane bay is an extension of the crane bay/transfer cell while each of the low bays, which are on opposite sides of the crane bay, has a 22-foot doorway and a 30-foot-high ceiling that provides shelter for the heavy-haul vehicle or the transportation cask rail car during load/unload operations. *See Lain/Sullivan at 7.*

4.39 Relative to heavy-haul truck fuel spills in the CTB, sumps and a 1-inch spill retention threshold are intended to keep diesel fuel spilled in the cask load/unload bay from spreading a fire toward the crane bay/transfer cell area. An automatically activated foam-water sprinkler system will be provided for the cask load/unload bay as well. The crane bay/transfer cell area floor also is sloped to prevent diesel fuel from a cask transporter from entering a transfer cell. In addition, the crane bay/transfer cell area will be equipped with smoke detectors, portable fire extinguishers, and hose stations for manual suppression. Finally, administrative controls along with closed vehicle access doors help to prevent the cask transporter from being in the CTB during a SNF canister transfer procedure, thus reducing the risk of fire during transfer. *See Dungan/Lewis Testimony at 8-9, 12-13; Lain/Sullivan Testimony at 9, 12.*

4.40 The vehicle fuel-related risk of fire has been further reduced by utilizing noncombustible materials in CTB construction. In addition to the use of the fire-rated barriers described in paragraph 4.38, the CTB itself is constructed out of steel-reinforced concrete material that is noncombustible and can withstand large amounts of heat for long periods of time. Further, the size of the CTB (260 feet long by 205 feet wide) contributes to fire prevention in that heat from a fire would dissipate due to the high clearance of the ceiling in the crane bay area. *See Dungan/Lewis Testimony at 8, 17; Lain/Sullivan Testimony at 8-9.*

b. Storage Cask Pad/Restricted Area Considerations

4.41 With regard to the storage cask pads, PFS has taken precautionary measures to reduce the possibility of fuel contamination and fire hazards. PFS plans to cover the Restricted Area with compacted gravel that would be 1-foot deep in the storage pad area. In addition, significant combustibles will be kept at a distance from the storage casks to reduce the risk of fire. Thus, a firebreak of at least 200 feet will be implemented between the nearest storage pad and any vegetation. Further, the rail line will be at least 110 feet away from the nearest storage pad and it will be 425 feet from the CTB to the nearest storage pad. Along these same lines, the cask transporter diesel fuel storage tank will be 700 feet from the nearest storage pad and 200 feet from the CTB, while the nearest propane tank will be 1800 feet away from the storage pads and the CTB. *See Dungan/Lewis Testimony at 5, 9, 17, 23; Lain/Sullivan Testimony at 5-6.* All these distances are deemed adequate to protect the storage casks from damage from diesel or propane storage tank fire or explosion. *See Dungan/Lewis Testimony at 23-25.*

2. Offsite Assistance During Working Hours

4.42 Section 3.6.4 of ISG-16, as well as section 5.4.2 of RG 3.67, call for a description of conditions that would require offsite protective actions and postulated accidents that could meet any of the conditions so as to require protective action recommendations to offsite authorities. *See ISG-16, at 10-11; RG 3.67, at 3.67-8 to -9.* For the reasons set forth below, we conclude that the extensive precautions that PFS has taken to prevent fire scenarios that could result in radiological contamination will not require an offsite assistance response during working hours.

a. PFS Assessment of Credible Fire Scenarios

4.43 A description of the various combustible materials creating risks for fire was given at the evidentiary hearing. *See Dungan/Lewis Testimony at 9-24;*

Lain/Sullivan Testimony at 7-12. The items of concern were diesel and gasoline fuel, truck tires, propane, gasoline, and in-situ process combustibles, such as electrical wires, *see* Dungan/Lewis Testimony at 10, each of which is discussed below.

I. DIESEL AND GASOLINE FUEL

4.44 Use of diesel fuel (as opposed to gasoline) also can be considered a safeguard to prevent any radiological release due to a combustion fire because diesel fuel is difficult to ignite under normal conditions. Diesel fuel has a flash point in excess of 120° Fahrenheit (F) and a boiling point range of 380°F to 650°F. Since at room temperature diesel fuel will not give off enough vapors to support combustion, it must be heated above its flash point. The autoignition temperature of diesel thus is greater than 490°F and can be as high as 545°F. There are no in situ sources at ground or floor level capable of reaching this temperature level, however. The only credible source for ignition thus is the hot surface of a vehicle engine and, while it is possible that a hot engine could ignite the spray from a fuel line break, such a fuel spray fire would burn only within a few feet of the line so as not to be severe enough to create a radiological hazard relative to the transportation of storage casks. *See id.* at 11-12.

4.45 In addition, PFS has taken specific precautions with respect to diesel fires from the cask transporter because of the direct role the transporter plays in transferring the newly loaded concrete storage casks from the transfer cells to the storage pad area, thereby putting combustibles in close proximity to the storage casks. First, the cask transporter will contain only a 50-gallon tank, thereby limiting the amount of combustible material. Furthermore, PFS will preclude the cask transporter from being in the transfer cell area during a transfer by implementing administrative procedures requiring transfer cell sliding shield doors to be closed after a transportation cask and empty storage cask are moved into a transfer cell, thus preventing the transporter from entering the cell during a transfer. And in the event some diesel does leak, as was noted in paragraph 4.39 above, the floor of the crane bay/transfer cell area will be sloped to prevent any fuel from seeping into the transfer cell area. Finally, the cask transporter will be equipped with a manual fire extinguisher and a driver trained to use it. *See* Dungan/Lewis Testimony at 12-13.

4.46 Further, pursuant to the guidance from section 6.5.5.2 of NUREG-1567 that a credible site fire should not exceed the fire assumptions in a cask fire analysis, *see* NUREG-1567, at 6-20, PFS evaluated the consequences on a storage cask of a “worst case” fire involving 50 gallons of diesel fuel from the cask transporter under two separate scenarios: one at the storage pad and one in a transfer cell itself. The storage cask chosen by PFS — the HI-STORM cask — was itself evaluated in a scenario involving a 200-gallon diesel fuel fire for 15

minutes. The results of that evaluation showed that only a few inches of the storage cask's heavy concrete structure were affected, and that the steel spent fuel canister inside the cask stayed within acceptable thermal limits. These evaluations demonstrated that the threat posed by a cask transporter fire, in which the 50 gallons of fuel would be expected to burn in 5 minutes, is not one that will impact either the integrity or performance of the HI-STORM storage cask or the steel SNF canister. *See Dungan/Lewis Testimony at 13; Lain/Sullivan Testimony at 9-10.*

4.47 In addition, PFS evaluated the canister transfer cask, which is the container that is used to transfer the SNF canister from the shipping cask to the storage cask, for fire integrity in a credible accident scenario. The canister transfer cask is protected by lead shielding and a water jacket, which would act like a heat sink to slow down the thermal stress during a fire. The bounding fire threat to a loaded transfer cask was considered to be a fire in the load/unload bay area. The calculated temperatures from this bounding fire threat were below the short-term temperature limits for the transfer cask and the SNF canister, which were found to be 700°F and 775°F, respectively, thus demonstrating this credible bounding accident scenario did not pose a threat to the transfer cask or the steel SNF canister. *See Lain/Sullivan Testimony at 10.*

4.48 Also incorporated into the facility design is a foam/water sprinkler system in the cask load/unload bay that, in accordance with NFPA 801, discharges foam for 10 minutes and then has a 60-minute water flow capacity. PFS has calculated that there will only be a need for two sprinklers, but will install three as a precautionary measure. The sprinkler system will be automatically activated by a flame detector and/or fusible elements present in the heads of the sprinklers. Also, a system of hydrants and standpipes is planned both inside and outside the CTB to provide water for fighting fires. To supply these systems, there will be two water tanks installed outside of the Restricted Area. Water from the tanks will be supplied to the systems by one of two pumps, one powered by an electric motor and the other, a backup, by a diesel engine. Either pump's capacity is sufficient to meet the systems needs, thus ensuring that the loss of electrical power will not hinder sprinkler or hydrant/standpipe system operation. *See Dungan/Lewis Testimony at 10, 15, 20; Lain/Sullivan Testimony at 13.*

4.49 According to PFS calculations, approximately 63,000 gallons of water would be necessary at any given time to supply the sprinkler system and the fire hoses for a worst-case water demand. NFPA 801 requires that the fire water tanks be refilled within 8 hours. According to PFS, it has complied with this guideline because it has an extra 100,000 gallons of water in a second tank. Although the Staff calculated the necessary supply at approximately 94,000 gallons, even using this figure PFS still complies with NFPA because it has an extra 100,000-gallon tank. *See Dungan/Lewis Testimony at 15, 28-29; Lain/Sullivan Testimony at 13; Tr. at 1575.*

4.50 If a rail spur line is not built to bring the transportation casks from the rail main line to the PFS facility, the proposed alternative to use heavy-haul trucks to bring the transportation casks from the Rowley Junction ITP also presents a possible diesel fire scenario. As with the cask transporter, PFS will restrict the size of the truck diesel tanks to a total of 300 gallons to limit the level of fire should any fuel leak. And, as was noted in paragraph 4.39 above, in the event of a spill in the cask load/unload bay area, fuel will be prevented from reaching the transfer/storage casks by a raised threshold between that bay and the transfer cell area. Additionally, the cask load/unload bay area floors are sloped to direct any leaking fuel into two 60-foot long, 6-foot wide sumps, which, in turn, are sloped to direct the fuel away from the bay center where any shipping cask and crane lifting cables would be located. Each sump is designed to hold the 300-gallon fuel load from a heavy-haul vehicle plus 30 minutes of flow from the foam/water sprinkler system. *See Dungan/Lewis Testimony at 14-15; Lain/Sullivan Testimony at 9.*

4.51 PFS also evaluated the scenario of a diesel fuel fire in the CTB cask load/unload bay from a heavy-haul vehicle fire, taking into consideration the vehicle's 300 gallons of diesel fuel and rubber tires as combustible materials. Without taking credit for the mitigative benefits of the CTB smoke removal, cask load/unload bay sump, and foam/water sprinkler systems, or any manual fire suppression efforts, a computer analysis calculating the fire plume temperature in the lower bay of the cask load/unload area and the average upper layer temperature of the high area of the crane/transfer cell bay nonetheless showed that the planned CTB concrete walls could withstand a fire without collapsing and the upper layer temperature (which was half of what would be needed to cause a facility combustibles flashover/autoignition) would not affect a loaded canister transfer cask. *See Dungan/Lewis Testimony at 16-17; Lain/Sullivan Testimony at 11.*

4.52 In addition to the heavy-haul trucks, locomotives used to move the spent fuel transportation casks between the main rail line junction and the PFS facility will also be carrying diesel fuel and thus present a source of combustible material. As was noted in paragraph 4.37 above, administrative controls will be implemented to prevent locomotives from entering the CTB at any time. Further, the cask car and spacer car will be positioned such that when the transportation cask is in the middle of the bay for pickup by the overhead crane, the locomotive will remain outside the building. Rail clamps will also be physically installed on the tracks to prevent any placement errors. Moreover, by placing a spacer car between the spent fuel car and the locomotive, the distance between the spent fuel transportation casks and any potential sources of combustibles will be enhanced, with the closest part of the locomotive 16 feet away from the CTB and the locomotive diesel tanks 36 feet away from the CTB. *See Dungan/Lewis Testimony at 18-20; Lain/Sullivan Testimony at 11-12.*

4.53 Notwithstanding these precautions, PFS did analyze a 6400-gallon locomotive diesel fuel spill and its effect on the casks located on the storage pads.

Assuming no sloping of the tracks away from the storage casks and calculating the heat flux from three different-sized pool fires under the locomotive and their effects on storage casks, PFS determined that, with the storage casks located some 110 feet from the locomotive, the heat flux produced on the storage casks would be less than the cask transporter fire scenario described in paragraph 4.46 above, thereby bounding this locomotive fire scenario. *See Dungan/Lewis Testimony at 20-21; Lain/Sullivan Testimony at 11-12.*

4.54 Further, with respect to other diesel and gasoline sources within the Restricted Area, PFS has demonstrated that the effects of any fire relative to these combustibles would not fall outside the cask transporter/locomotive bounding analyses described above. As was referenced in paragraph 4.44 above, because at room temperature diesel fuel does not give off enough vapors to support combustion, diesel fuel has a high flashpoint that must be reached for ignition, thereby making hot engine surfaces the only credible ignition sources. Consequently, ignition of the various nonvehicular diesel fuel sources, such as the SHPB electrical backup diesel generator tank and the supply tank for other PFS vehicles such as the heavy-haul trucks, is unlikely. Further, PFS maintenance trucks will have smaller diesel fuel tanks than the cask transporter vehicle. Although diesel fuel for the cask transporter will be brought on site by a diesel truck with a maximum capacity of 10,000 gallons, the truck and the storage tank will be no closer to the CTB and the storage pads than 200 feet and 700 feet, respectively, distances much beyond those in the locomotive bounding scenario. *See Dungan/Lewis Testimony at 11, 17-18.*

4.55 On the other hand, because gasoline ignites at a lower temperature than diesel fuel, PFS intends to regulate the use of gasoline-powered vehicles and machinery and allow such equipment to be present only intermittently in the Restricted Area, if at all. Yet, even if there were a gasoline ignition in the Restricted Area, because large gasoline and diesel fires burn with similar characteristics there would be little threat to the SNF casks as established by the previous cask integrity bounding limits. *See Dungan/Lewis Testimony at 11-12, 17-18.*

II. PROPANE FIRES

4.56 PFS also prepared a safety analysis regarding onsite propane sources. Propane, which will be used for heating the CTB and the SHPB, will be stored either in single or multiple tanks that contain no more than 20,000 gallons of fuel and are designed in accordance with the requirements of NFPA 58. The tank (or tanks) will be located a minimum distance of 1800 feet from the CTB and the nearest cask storage pads. *See Dungan/Lewis Testimony at 23; Lain/Sullivan at 6.*

4.57 Distribution of propane will occur through underground buried, all-welded steel piping to reduce the risk of leakage. Because of the large distances from the tanks to the buildings, the system will include a compressor to provide the necessary force to propel the propane vapor. An excess flow monitor will also be installed to regulate the flow of fuel to the buildings so there will not be excess pressure in the pipelines. Finally, the propane heaters at the CTB, which will comply with the requirements of NFPA 54, will be installed on the roof of the building so that no propane can enter the CTB. *See Dungan/Lewis Testimony at 23, 25.*

4.58 PFS evaluated the potential impact of propane fires on the storage casks at the facility as well. Two scenarios were found that could pose a threat to the canisters: (1) an uncontrolled vapor cloud explosion from the propane used for space heating; and (2) flash fires and boiling liquid expanding vapor explosions. Regarding the vapor cloud explosion scenario, PFS concluded that the type of large, rapid, concentrated release that would be needed for this scenario would not be possible without a tank failure. Yet, based on the locations of the tanks, the openness of the area, and the lack of any credible electrical ignition sources, the only high energy ignition source capable of igniting a large release — a turbulence-causing obstruction that could build a flame-front pressure wave that would cause a tank to explode — would not exist. Further, although PFS determined that the second scenario — flash fire/boiling liquid expanding vapor explosion that would produce a short-duration, high-radiative heat flux — was more credible, the separation distance from the propane storage tanks and the noncombustibility of the CTB structure and the spent fuel casks would prevent this scenario from threatening SNF cask or canister integrity. *See id.* at 24-25.

III. IN SITU COMBUSTIBLES

4.59 Finally, the evidence before the Board indicates that a small electrical fire is the only likely scenario for in situ combustibles. Such incidents will not be a threat to cask integrity, however, because they cannot generate enough energy to propagate in structures such as the CTB or have an impact on storage cask configurations. The fact that, outside the electrical equipment room, all electrical cable will be encased in conduit to protect against potential electrical fires further dissipates the efficacy of these combustion scenarios. *See id.* at 25; Tr. at 1485. By the same token, the fire water pumps are located outside the Restricted Area and have a separate wiring circuit, so that a fire in the CTB will not impact or affect the pumps' operability. Tr. at 1527.

IV. CONCLUSION

4.60 The State has argued that, although 10 C.F.R. § 72.32(a)(8), (12), and (15), along with associated regulatory guidance provisions, operate on the

assumption that offsite assistance will be available to an applicant to fight fires on site, this presumption should not apply to PFS because the PFS plan calls for offsite emergency assistance to come from Tooele City, which is over 50 miles away from the PFS site by road so as to be effectively unavailable. As a consequence, the State has asked the Board to take into account the unavailability of offsite assistance in evaluating the PFS emergency plan. *See* State Findings at 11-12.

4.61 We, however, decline to adopt the State's assertion that the PFS emergency plan is insufficient to satisfy the applicable regulatory requirements found in 10 C.F.R. § 72.32(a) regarding the provision of adequate offsite assistance. Neither 10 C.F.R. § 72.32(a) nor the regulatory guidance referenced by the parties (i.e., RG 3.67 and ISG-16) indicate that offsite assistance must be used at an ISFSI. Instead, they provide criteria that are to be utilized in assessing the sufficiency of any emergency plan provisions that do rely on such assistance. *See* 60 Fed. Reg. 32,430, 32,436 (1995) (in response to public comment issue thirty-four, ISFSI emergency planning requirements final rule statement of considerations indicates that offsite emergency organizations are those that "may" be needed to respond to an emergency). As is shown by the detailed description above, PFS has addressed the relevant, credible scenarios involving the ignition of a fire that reasonably could result in an SNF transportation or storage casks radiological release and has demonstrated that, relative to its fire protection efforts during working hours, no offsite assistance is required because PFS facility design and firefighting capabilities are self-sufficient. Moreover, even though offsite assistance is not necessary to a finding that PFS has an adequate emergency plan, as is required in section 72.32(a)(15), PFS has made arrangements with Tooele County for potential assistance from county fire protection services. *See* PFS Exh. G at 9.5-2; Tr. at 1547.

3. *Offsite Assistance During Nonbusiness Hours*

4.62 The State also claims that PFS has failed to show that necessary offsite assistance will be available during nonbusiness hours. In this regard, noting that PFS does not plan to have any fire brigade members on site during nonbusiness hours, the State argues that PFS has failed to comply with both section 4.2 of RG 3.67, which requires a description of the "onsite emergency response organization for the facility, and include the organization for periods such as offshift, holidays, weekends, and extended outages when normal operations are not being conducted" and section 3.8.2 of ISG-16, which contains almost identical criteria. RG 3.67, at 3.67-6; *see* ISG-16, at 12. Further, the State asserts that the admitted 90-minute response time by on-call PFS fire brigade members is wholly inadequate to establish the sufficiency of the PFS emergency plan. *See* State Findings at 8-9. Assuming, however, this guidance regarding the

onsite emergency response organization is applicable to the question of offsite assistance, it is apparent that PFS likewise has demonstrated that offsite assistance during nonbusiness hours is not required to provide the requisite protection for the public health and safety.

4.63 PFS has declared that no spent fuel canister transfers will take place during nonbusiness hours. With electrical machinery (e.g., cranes) not running in areas in which radioactive releases are a concern, an electrical fire becomes of minimal concern as well. Combustion fires also would not be a concern because the potential significant combustion ignition sources — heavy-haul truck, cask transporters, locomotives, and other vehicles — will not be operating. *See Dungan/Lewis Testimony* at 11, 26-27; *Tr.* at 1512-13, 1528-29, 1568. Moreover, even if a fire were to start and continue unmitigated, the bounding scenarios described by PFS make it apparent that cask or spent fuel canister fire exposure would be insufficient to cause a confinement breach with radiological releases. *See Dungan/Lewis Testimony* at 29. Accordingly, we likewise find that because no offsite assistance is necessary during off-hours, there is no breach of any applicable regulatory requirements or guidelines, such as RG 3.67 and ISG-16, in connection with the PFS plan to place fire brigade members on call during nonbusiness hours.

E. PFS Noncompliance with NFPA 600 Standards

4.64 In addition to its arguments concerning the applicability of NFPA 600, the State also has asserted that the PFS emergency plan does not comply with NFPA 600, and thus does not comply with 10 C.F.R. § 72.32(a), in three respects: (1) the PFS brigade staffing does not conform with paragraph 5-3.5 of NFPA 600, which requires a two-person backup; (2) the location where PFS has chosen to store protective clothing and equipment does not meet the NFPA subchapter 5-3 standard; and (3) PFS lacks an adequate organizational statement in conformance with paragraphs 1-4.1 and 2-1.2.1 of NFPA 600. *See State Findings* at 15-16. We conclude that PFS has met these NFPA 600 standards.

1. Fire Brigade Structural Requirements

4.65 Relative to the State's concern regarding backup staffing, paragraph 5-3.5 of the 2000 version of NFPA 600 indicates that for industrial fire brigades that perform interior structural firefighting:

Industrial fire brigade members using [self-contained breathing apparatus (SCBA)] shall operate in teams of two or more who are in communication with each other through visual or voice contact to coordinate their activities and are in close proximity to each other to provide assistance in case of an emergency.

Where industrial fire brigade members are involved in operations that require the use of SCBA, at least two members shall be assigned to remain outside the area where respiratory protection is required.

NFPA 600, at 600-11. This standard's call for two fire brigade members to remain outside the respiratory protection area was a change from the previous version, which only required one member to do so. *See* State Exh. 6, at 600-12 (NFPA 600 Standard on Industrial Fire Brigades (1996 ed.)). PFS witness Dungan initially stated PFS only intended to have one fire brigade member remain outside the "hot zone" (i.e., the area where SCBA are worn, *see* NFPA 600 ¶ 2-2.4(2), at 600-8) as backup. *See* Tr. at 1506-07. Nonetheless, after being informed that a revision to the guidelines quoted above in the 2000 edition of NFPA 600 made it clear that two brigade members are needed for a respiratory protection area/hot zone backup, Mr. Dungan stated that PFS would comply with this NFPA 600 guideline to have two members outside of a respiratory protection area in a fire emergency. *See* Tr. at 1666. While this commitment resolves this specific point, there remains the related question of whether the overall staffing plan is adequate, which we discuss under section IV.E.4 below.

2. Protective Clothing and Equipment

4.66 The State also declares that PFS has failed to comply with subchapter 5-3 of NFPA 600 because SCBA and other protective gear will be stored in the SHPB, which (1) would delay response time for a fire in the CTB; and (2) could place brigade members in danger by causing them to risk responding to a CTB fire without their gear. *See* State Findings at 15-16. We do not agree. Putting aside the fact that subchapter 5.3 of NFPA 600 does not specify where equipment should be stored and that the State has not made any alternative suggestion regarding a better location for the equipment, the State's first concern about delay is misplaced given the PFS showing, as outlined in section IV.D above, that onsite fire brigade reaction is not necessary to avert fire-related radiological impacts.

4.67 Likewise, the State's second concern is not persuasive given the precept that, in the absence of evidence to the contrary, we will not presume that an applicant or licensee, and those who work for them, will not adhere to applicable regulations or standards. *See General Public Utilities Nuclear Corp. (Oyster Creek Nuclear Generating Station)*, LBP-96-23, 44 NRC 143, 164 (1996). In this instance, paragraph 2-2.4 and subchapters 4-3 and 5-3 of NFPA 600 establish certain guidelines as to when it is appropriate for a fire brigade member to enter warm or hot zones in a fire emergency or otherwise engage in firefighting activities. *See* NFPA 600, at 600-8, -10 to -11. Moreover, paragraph 2-2.1.6 of NFPA 600 mandates:

The incident management system shall ensure that the risk to members is evaluated prior to taking action. In situations where the risk to industrial fire brigade members is unacceptable, the emergency response activities shall be limited to defensive operations.

Regardless of the risk, actions shall not exceed the scope of the organizational statement and standard operating procedures.

NFPA 600, at 600-7. In this instance, in the absence of any evidence suggesting that PFS workers will ignore such standards (or will not be properly trained to follow such standards), the PFS commitment to comply with NFPA 600 standards, *see* Dungan/Lewis Testimony at 26, essentially answers the State's concern that equipment storage in the SHPB will endanger PFS workers.

3. PFS Organizational Statement and Training Requirements

4.68 Citing paragraphs 1-4.1 and 2-1.2.1 of NFPA 600, the State also argues that the PFS plan for training its fire brigade members is inadequate because PFS has provided only sketchy details about the type, amount, and frequency of training; the limits of the fire brigade's actions and responsibility; and the workplace duties the members of the fire brigade are to perform. *See* State Findings at 16. PFS, however, has indicated that all fire brigade members may, as members of its Instrument/Electrical Maintenance, Mechanical Maintenance/Operations, and Radiation Protection departments, be involved in cask transfer operations and has committed to complying with NFPA 600 standards for organizing, operating, equipping, and training its fire brigade employees. *See* Dungan/Lewis Testimony at 27; Tr. at 1511; PFS Exh. G at 4-3. This training will include, among other things, training on the types and dangers of fires, protective clothing, SCBA use, fire truck operation, and fighting fires involving radioactive materials. *See* State Exh. 4, at 1 of 2; PFS Exh. G at 6-2 (PFS Emergency Plan, Chapter 6 (rev. 9)). Moreover, this training will be in combination with a general employee training program intended to provide all employees at the facility with basic firefighting knowledge and skills, including fire reporting requirements, the types of fires, and the use of manual fire extinguishers. *See* Tr. at 1512; PFS Exh. G at 9.3-3 (PFS SAR Chapter 9 (rev. 13)). PFS also declared it will comply with NFPA 600 standards that require fire brigade members to have quarterly educational training, a semiannual drill, and live fire exercises at least annually. *See* Tr. at 1511; *see also* NFPA 600 subch. 4-2, at 600-10. In conformity with the well-established precept that emergency planning implementing procedures — the how-to and what-to-do details of the plan — should not become the focus of the adjudicatory process, *see Louisiana Power and Light Co. (Waterford Steam Electric Station, Unit 3), ALAB-732, 17 NRC 1076, 1106-07 (1983); see also Curators of the University of Missouri, CLI-95-1, 41 NRC at 140-42 (asserted failure of emergency plan to identify response team individuals' responsibilities*

and describe firefighting training seeks unnecessary level of detail), this PFS showing is sufficient to establish the adequacy of PFS emergency planning efforts relative to these State concerns.

4. PFS Staffing

4.69 In addition to its arguments about lack of compliance with specific NFPA 600 standards, the State alleges that the PFS emergency plan is deficient because there are not enough individuals to perform all of the duties that NFPA 600 requires for compliance with its dictates. Citing the stated PFS intention to train eleven of its planned twenty-four nonsecurity personnel to serve as needed on its five-person fire brigade, the State declares this is not adequate because it would leave PFS short-staffed with too few people doing too many things. According to the State, PFS will need one fire person to drive the onsite fire truck to the fire, a second firefighter to retrieve the second fire truck from the Skull Valley Band village on the reservation, two firefighters to man the hoses and pumps on these fire trucks, an incident commander, and two backup firefighters for the respiratory protection area/hot zone. *See* State Findings at 16-18.

4.70 PFS has stated that there will be eleven individuals trained to be fire brigade members, with five members on call at any one time to form a fire brigade. *See* Tr. at 1525. Assuming that only five individuals are available, however, this nonetheless is sufficient to provide adequate fire brigade coverage.

4.71 As described previously, the measures taken by PFS to prevent and minimize the impact of fires as sources of radiological release suggest that the role of the PFS fire brigade will be limited to extinguishing fires too small to actuate the automatic foam/water sprinkler system, provide support to ensure fire pumps are running, personnel are evacuated properly, and utilities (e.g., power and fuel) are disconnected. And in the event of an outside fire, the brigade's role is likely to involve only burn control to limit fire exposures or vehicle fire suppression in the event it cannot be handled by the operator. *See* Dungan/Lewis Testimony at 26.

4.72 PFS further maintains that the onsite and the Skull Valley Band reservation fire trucks are not mandated by regulatory requirements nor will they be needed (other than perhaps as providing backup pressure for the main fire pumps or to bring additional hose or equipment to the fire site) given the availability of the foam/sprinkler system and the hydrant/standpipe system. *See id.* at 27; Tr. at 1505-06, 1534. Nonetheless, assuming that a fire truck response is needed, the State has overstated the number of fire truck drivers needed given that the Skull Valley Band reservation truck is intended to be a backup, *see* Tr. at 1505, and at least four (and possibly all) of the eleven fire brigade members will be able to do double duty as driver and operator of a fire truck, *see* Tr. at 1496-97, 1525. Moreover, even if the onsite or Skull Valley Band fire trucks are needed, other PFS non-fire brigade personnel trained in the operation of heavy-haul machinery

could retrieve the trucks and fire brigade members, other than the five “on call” brigade members designated to respond to a fire, could retrieve and operate the trucks, if necessary. *See* Tr. at 1525-26.

4.73 Furthermore, as was noted above, PFS has stated it will comply with paragraph 5-3.5 of NFPA 600 in that two men will remain outside of the respiratory protection area/hot zone as a rescue crew for the crew of two who enter the zone. One of these two backup men can also function as the brigade commander responsible for assessing the location, function, and time of entry into the respiratory protection area/hot zone of the other two brigade members. *See* Tr. at 1506-07, 1639-40; *see also* NFPA 600 ¶5-3.5, at 600-11. Thus, utilizing a five-person brigade, with one member as the fire truck driver/operator and two members as the backup crew, this still leaves two individuals who, as a team, could use the SCBA to go into the CTB and perform rescue operations or manually extinguish fires using either the hydrant/standpipe system or the truck hose.

4.74 Of course, this analysis does not include the other six trained fire brigade members who are possibly on site and could aid the five brigade members designated to respond in the first instance. And there is no credible evidence that the fact that any of the fire brigade members will have other duties at the facility would impair his or her ability to provide a timely response to a fire emergency. *See* Tr. at 1526-27; *see also* 1565-66.

F. PFS Water Supply

4.75 The State also claims the PFS emergency plan is deficient because there is merely an assumption that there will be an adequate source of water to fill and replenish the two 100,000-gallon tanks that will supply the sprinkler system and other manual methods for extinguishing fires. *See* State Response at 6-7. Relative to its water supply, PFS has stated that it will follow the guidelines set forth in NFPA 13, which sets standards for primary water tank capacity needed to fight the largest fixed fire based on suppression system demand and hose stream allowances, and NFPA 801, which sets an 8-hour water tank refill time limit. *See* Lain/Sullivan Testimony at 13. This PFS agreement to comply with the standards carries with it the commitment to obtain enough water timely to fill and refill the tanks, no matter where the water originates from. PFS has stated that it will acquire water by drilling wells on site or from some other offsite source, such as the existing water supply of the Skull Valley Band reservation, *see* Tr. at 1485-86, which the Staff concludes shows that PFS will have an adequate water supply for firefighting, *see* Lain/Sullivan Testimony at 13.⁶ We agree and, contrary to the

⁶ Although PFS and the Staff put forth different figures for the amount of water that was necessary to fulfill the

State's assertion, find that questions about the authority of PFS to drills wells on the Skull Valley Band reservation without State authorization are outside of the scope of this contention. *See* Tr. at 1486-87.

G. License Conditions

4.76 The State also has asserted that the commitments made by PFS relative to satisfying various NFPA standards for fire protection at its proposed ISFSI facility should be codified as license conditions in accordance with the Commission's decision in CLI-00-13 and 10 C.F.R. §§ 72.32, 72.122(c). *See* State Response at 5-6. We do not agree, for the reasons set forth below.

4.77 Existing precedent indicates that the addition of a condition to a license, whether in the form of a technical specification or otherwise, should be a matter that a presiding officer approaches with some caution. For instance, relative to technical specification conditions for power reactor licenses, the Appeal Board observed:

technical specifications are to be reserved for those matters as to which the imposition of rigid conditions or limitations upon reactor operation is deemed necessary to obviate the possibility of an abnormal situation or event giving rise to an immediate threat to the public health and safety.

Portland General Electric Co. (Trojan Nuclear Plant), ALAB-531, 9 NRC 263, 273 (1979) (footnote omitted). While this suggests that the threshold for imposing a technical license condition is not insignificant, in other contexts, in particular financial qualification matters, Commission rulings like CLI-00-13 indicate that the threshold may be somewhat lower. *See* CLI-00-13, 52 NRC at 32 (adopting as ISFSI license conditions PFS financial qualification commitments made during the licensing process); *Louisiana Energy Services, L.P.* (Claiborne Enrichment Center), CLI-97-15, 46 NRC 294, 308-09 (1997) (adopting as enrichment facility license conditions financial qualification commitments made in applicant pleadings).

4.78 In the context of emergency planning relating to fire protection matters, in its decision in *Curators of the University of Missouri*, CLI-95-1, 41 NRC at 158-63, the Commission indicated that presiding officer-imposed license conditions may, in fact, be appropriate, albeit emphasizing that fire safety conditions must be directed to hazards associated with nuclear materials. The conditions at issue were intended to address a particular situation that required a specific

NFPA 13 standard — 63,000 and 94,000 gallons, respectively — they were in agreement that the provision for two 100,000-gallon tanks was adequate to meet that guideline. *Compare* Dungan/Lewis Testimony at 28 with Tr. at 1575.

remedy. Moreover, in the one instance in which compliance with NFPA standards was required, regarding a sprinkler system, there apparently was no applicant commitment to follow those standards.

4.79 In this instance, the conditions at issue are statements that PFS has made in the course of its proposed findings, generally referencing either the direct testimony of PFS witnesses Mr. Dungan and Mr. Lewis or its application, indicating that relative to PFS facility design, construction, organization, equipment installation/maintenance, staffing, and training, PFS will comply with various NFPA standards, including NFPA 14, NFPA 16, NFPA 24, NFPA 25, NFPA 54, NFPA 58, NFPA 72, NFPA 600, and NFPA 801. Because these finding statements, which are based on PFS statements by witnesses under oath before the Board or as part of its application, indicate a willingness to comply with all or a portion of specific, nationally recognized consensus standards, we think little purpose would be served in repeating the terms of these commitments as license conditions (or as Board directives, *see Commonwealth Edison Co. (Zion Station, Units 1 and 2), ALAB-616, 12 NRC 419, 423-24 (1980)* (although matters are not worthy of technical specification, Board will incorporate commitments in its order to make them formally enforceable)). The penalties that flow from making false statements to the Board and the Staff, including the possibility of criminal violations under 18 U.S.C. § 1001 and agency enforcement actions, appear sufficient in this instance to ensure compliance without the additional step of incorporating into this decision a list of commitments that PFS has clearly acknowledged it accepts and will fulfill.⁷ *See Florida Power & Light Co. (Turkey Point Nuclear Generating Plant, Units 3 and 4), ALAB-898, 28 NRC 36, 41 n.20 (1988)* (no need to incorporate applicant commitment into order given potential Staff enforcement).

V. SUMMARY FINDINGS OF FACT AND CONCLUSIONS OF LAW

5.1 Having considered all of the evidence submitted by the parties in this proceeding relative to the State's contention Utah R, Emergency Plan, including the proposed findings of fact and conclusions of law submitted by the parties, based on the findings and conclusions set forth in section IV above, the Board finds that PFS has met its burden to establish that its emergency plan provides reasonable assurance that, in the event of a fire at the PFS facility, the public

⁷The adoption in this Board issuance of license conditions incorporating the PFS commitments outlined by the State may seem to be no more than a ministerial precaution. Nonetheless, repeated commitment incorporation may have the long-term impact of causing applicants to underestimate the gravity of making (or failing to uphold) such commitments to the Board and/or the Staff regardless of their adoption as "license conditions" or a Board directive.

health and safety will be protected. In this regard, the Board finds that the PFS emergency plan meets the applicable regulatory criteria in that it adequately describes the types of radioactive materials accidents that may involve a fire emergency and the means and equipment to be used to mitigate such accidents as well as establishes that PFS has adequate support capability (including water supply and firefighting personnel) for use in fighting fires on site. Therefore, relative to the issues raised in contention Utah R, in accordance with 10 C.F.R. §§ 72.24(k), 72.40(a)(11), we find that PFS has provided an adequate description of its plans for coping with emergencies involving fires in compliance with 10 C.F.R. § 72.32(a) and thus contention Utah R is resolved in favor of PFS.

6.1 Pursuant to 10 C.F.R. § 2.760, it is, this twenty-ninth day of December 2000, ORDERED, that this First Partial Initial Decision will constitute a final decision of the Commission forty (40) days from the date of issuance, or on *Wednesday, February 7, 2001*, unless a petition for review is filed in accordance with 10 C.F.R. § 2.786, or the Commission directs otherwise. Any party wishing to file a petition for review on the grounds specified in 10 C.F.R. § 2.786(b)(4) must do so within fifteen (15) days after service of this First Partial Initial Decision. The filing of a petition for review is mandatory in order for a party to have exhausted its administrative remedies before seeking judicial review. Within ten (10) days after service of a petition for review, parties to this proceeding may file

an answer supporting or opposing Commission review. Any petition for review and any answer shall conform to the requirements of 10 C.F.R. § 2.786(b)(2)-(3).

THE ATOMIC SAFETY AND
LICENSING BOARD⁸

G. Paul Bollwerk, III, Chairman
ADMINISTRATIVE JUDGE

Dr. Jerry R. Kline
ADMINISTRATIVE JUDGE

Dr. Peter S. Lam
ADMINISTRATIVE JUDGE

Rockville, Maryland
December 29, 2000

⁸ Copies of this First Partial Initial Decision were sent this date by Internet e-mail transmission to counsel for (1) Applicant PFS; (2) Intervenors Skull Valley Band, Ohngo Gaudadeh Devia, Confederated Tribes of the Goshute Reservation, Southern Utah Wilderness Alliance, and the State; and (3) the Staff.

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